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The Shrinking Back: The Law of Biography

Mary Sarah Bilder*

I. INTRODUCTION

We should all be ready to say that if the secrets of our daily lives and inner souls may instruct other surviving souls, let them be open to men hereafter, even as they are to God now. . . . Not that I do not intimately understand the shrinking back from the idea of publicity on any terms—not that I would not myself destroy papers of mine which were sacred to *me* for personal reasons—but then I never would call this natural weakness, virtue—nor would I, as a teacher of the public, announce it and attempt to justify it as an example to other minds and acts, I hope.¹

Elizabeth Barrett Browning would not be pleased with the law of biography. The “law of biography” is not a phrase used in law schools, despite the rise of so-called “law and . . .” courses² and the current recognition of a “law and literature” school.³ A literary critic, William Epstein, used the phrase

* © 1990 by Mary Sarah Bilder. Clerk to the Honorable Francis D. Murnaghan, Jr., United States Court of Appeals for the Fourth Circuit. B.A., 1987, University of Wisconsin-Madison; J.D., 1990, Harvard.

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I also thank my parents, particularly for believing in opposite solutions to the issues discussed in this article, and the numerous others who offered anecdotes and provided encouragement. Above all, my sincere appreciation to Professor Terry Fisher and Professor Standish Henning.

1. Elizabeth Barrett Browning, in ROBERT BROWNING, 1 LETTERS OF ROBERT BROWNING AND ELIZABETH BARRETT BROWNING 481 (1898), *quoted in* RICHARD D. ALTICK, LIVES AND LETTERS: A HISTORY OF LITERARY BIOGRAPHY IN ENGLAND AND AMERICA 159 n.4 (1965). Browning may not have overcome “this natural weakness.” Altick speculates that she would “have applauded” the efforts of her husband to restrict access to papers “in her own case.”

2. See David Margolick, *At the Bar*, N.Y. Times, Jan. 13, 1989, at B6, col. 1.

3. See generally RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988); James Boyd White, *What Can a Lawyer Learn from Literature?* (Book Review), 102 HARV. L. REV. 2014 (1989).

in warning his readers that his book on biography would "disrupt, deform, and de-authorize the rule-governed relationships (the so-called generic conventions) by and through which the 'law' of biography is and has been understood."⁴ The law of biography encompasses more than the customs, practices, and habits of biographers; a legal "law of biography" also exists. Molded by copyright law and enlivened by privacy law, this "legal" law recently has come under intense scrutiny. Congressional bills,⁵ legislative hearings,⁶ and extensive commentary have examined developments over the past several years that appear to foreclose the opportunity to use the unpublished expression written by biographical subjects without their or their estates' express permission. In this article, I seek to describe the law, to dishevel its assumptions, and to suggest that only by altering the legal doctrine can we understand our history and instruct ourselves, the surviving souls.

But first, a very brief history of biography. The earliest biographies were typically didactic stories of heroism told by authors (almost always men) who knew their subjects.⁷ Biography served the purpose of conveying a message to the audience about the good life. For several centuries, biography sporadically reappeared in this form.⁸

Then came the development of modern biography, a process biographical theorists describe as possessing three epiphanal moments. First came Boswell's *Life of Johnson*.⁹ This biography broke the traditional rules about writing biography: it contained more James Boswell than Samuel Johnson; relied heavily upon Boswell's recollection of Johnson's voice; displayed extensive research; did not hesitate to portray Johnson in less than the most flattering light; and was brilliantly written. Boswell, despite criticism, became the father of modern biography.¹⁰

4. WILLIAM H. EPSTEIN, *RECOGNIZING BIOGRAPHY* 3 (1987).

5. See H.R. 4263, 101st Cong., 2d. Sess., 136 CONG. REC. H805-06, H830 (1990); S. 2370, 101st Cong., 2d Sess., 136 CONG. REC. S3532, S3549-50 (1990). The bills would have amended 17 U.S.C. § 107 to state that the fair use doctrine applies to published and unpublished works.

6. *Fair Use and Unpublished Works: Hearings on H.R. 4263 and S. 2370 Before the Subcomm. on Courts, Intellectual Property and the Admin. of Justice of the House Judiciary Comm. and the Subcomm. on the Constitution of the Senate Judiciary Comm.*, 101st Cong., 2d Sess. (1990) [hereinafter *Hearings*]. The official committee print of the hearings had not been published prior to the publication of this article. References to *Hearings* are to the unofficial copies of individual submitted statements (on file with the *Stanford Law Review*).

7. Biography, as United States audiences understand it, is a product of "Western" culture. The earliest biographies appeared in Greece and Rome, by authors such as Plato and Plutarch, followed by biographies exploring the lives of the saints (hagiography). See ROBERT GITTINGS, *THE NATURE OF BIOGRAPHY* 18-21 (1978); PAUL MURRAY KENDALL, *THE ART OF BIOGRAPHY* 89-90 (1965).

8. Notable biographies after the Elizabethan Age included a few by women about their husbands, for example those by Lucy Hutchinson and Margaret Cavendish, Duchess of Newcastle. See R. GITTINGS, *supra* note 7, at 29; P.M. KENDALL, *supra* note 7, at 96. Later came biographies written by Roger North, Izaak Walton, John Aubrey, Thomas More, and Dr. Samuel Johnson. See R. GITTINGS, *supra* note 7, at 23, 26-29, 31. See generally R. ALTICK, *supra* note 1, at 3-45.

9. JAMES BOSWELL, *BOSWELL'S LIFE OF JOHNSON* (G.B. Hill & L.F. Powell rev. ed. 1964) (1791).

10. See R. GITTINGS, *supra* note 7, at 31-33; see also R. ALTICK, *supra* note 1, at 46-74; LEON EDEL, *WRITING LIVES: PRINCIPIA BIOGRAPHICA* 42-58 (1984); RICHARD ELLMANN, *GOLDEN*

The second moment came with Lytton Strachey's *Eminent Victorians*.¹¹ Strachey's short, acerbic, undocumented, highly literate biography sought primarily to criticize. He condemned traditional biographies, which merely "commemorate the dead . . . with their ill-digested masses of material, their slipshod style, their tone of tedious panegyric, their lamentable lack of selection, of detachment, of design[.] They are as familiar as the *cortege* of the undertaker and wear the same air of slow, funereal barbarism."¹² Strachey echoed Boswell's promotion of the biographer and set new standards for biography: It could—in fact, should—be innovative, critical, and literary.¹³

Freud and psychoanalysis appear to constitute a third moment.¹⁴ Although overt psychobiography has not gained prominence,¹⁵ Freud's influence can be seen in the legitimation of the inquiry into the mind of the subject often through the analysis of short quotations.¹⁶ Modern biography continues to evolve, with an increasing emphasis on the social, political, and economic circumstances affecting the subject.¹⁷ And as any browser in a bookstore will notice, biography addresses a diversity of subject matters and historiographical approaches.¹⁸

CODGERS: BIOGRAPHICAL SPECULATIONS 2-4 (1973). For approximately the next 100 years, few followed Boswell's lead, owing to the rising Evangelical movement. As a consequence, biography became, in essence, "the art of concealment." A few biographies were exceptions: Thomas Carlyle, Mrs. Gaskell, James Anthony Froude. See R. GITTINGS, *supra* note 7, at 35-37. See generally A.O.J. COCKSHUT, TRUTH TO LIFE: THE ART OF BIOGRAPHY IN THE NINETEENTH CENTURY (1974) (describing biography in the late Victorian period).

11. LYTTON STRACHEY, *EMINENT VICTORIANS* (1918); see R. GITTINGS, *supra* note 7, at 38-39, 41-42; DAVID NOVARR, *THE LINES OF LIFE: THEORIES OF BIOGRAPHY, 1880-1970*, at 27-30 (1986).

12. R. GITTINGS, *supra* note 7, at 38.

13. See *id.* at 39. Leon Edel suggests that Strachey became too literary and crossed into "biographical fiction." See L. EDEL, *supra* note 10, at 79.

14. Freudian psychoanalysis predates Strachey, but its influence was felt most strongly beginning in the 1920s. See R. ALTICK, *supra* note 1, at 334-43; MILTON LOMASK, *THE BIOGRAPHER'S CRAFT* 121-31 (1986).

15. See R. ELLMANN, *supra* note 10, at 256.

16. See R. GITTINGS, *supra* note 7, at 42-52; P.M. KENDALL, *supra* note 7, at 116, 121-22. Ernest Jones's biography of Freud may be one of the most successful examples.

17. See R. GITTINGS, *supra* note 7, at 54-58 (discussing the influence of Marxism).

18. Biographers explore the tension between biographical fact and fiction. See generally VIRGINIA WOOLF, *ORLANDO: A BIOGRAPHY* (1928); Bruce Duffy, *The Do-It-Yourself Life of Ludwig Wittgenstein*, N.Y. Times, Nov. 13, 1988, § 7 (Book Review), at 1, 68-69 (discussing freedom of novelistic biography); Caryn James, *The Characters are Real, the History Isn't*, N.Y. Times, Jan. 4, 1989, at C15, col. 1 (discussing novelistic biography). They write about relationships, see R. GITTINGS, *supra* note 7, at 80-82 (discussing biographies of H.G. Wells and Rebecca West); JEFFREY MEYERS, *E.M. Forster and T.E. Lawrence: A Friendship*, in *THE SPIRIT OF BIOGRAPHY* 91-99 (1989); JEFFREY MEYERS, *Wyndham Lewis and T.S. Eliot: A Friendship*, in *THE SPIRIT OF BIOGRAPHY*, *supra*, at 175-85; Gavan Daws, *"I Reach Beyond the Laboratory-Brain": Men, Dolphins, and Biography*, in *ESSAYING BIOGRAPHY: A CELEBRATION FOR LEON EDEL* 167-91 (G. Fromm ed. 1986); they write about groups, see R. GITTINGS, *supra* note 7, at 84; Margot Peters, *Group Biography: Challenges and Methods*, in *NEW DIRECTIONS IN BIOGRAPHY* 41-51 (A. Friedson ed. 1982); and they write about families, see, e.g., Leslie A. Marchand, *Mary Came Along and Changed Everything*, N.Y. Times, Nov. 5, 1989, § 7 (Book Review), at 38, col. 1 (reviewing WILLIAM ST. CLAIR, *THE GODWINS AND THE SHELLEYS: THE BIOGRAPHY OF A FAMILY* (1989)). They produce hefty "definitive" works overstuffing with primary sources, see R. GITTINGS, *supra* note 7, at 64-67 (criticizing the "definitive" work); P.M. KENDALL, *supra* note 7, at 131-32; and shorter impressionistic books, see *id.* at 131-32. They write for and about the famous and the unknown, see R. GITTINGS,

In practicing the craft, biographers have faced formal legal restrictions on their activities.¹⁹ Legal doctrines have placed powerful shields on the forearms of many subjects (and their families) reluctant to have their lives examined and exposed by biographers. Vladimir Nabokov wrote to his biographer: "I shall not hesitate to sue you for breach of contract, slander, libel, and deliberate attempts to damage my personal reputation . . ."²⁰ Biographers have been sued for the unauthorized use of unpublished²¹ and published material,²² defamation,²³ invasion of privacy,²⁴ transcription of

supra note 7, at 74-78 (praising HUGH TREVOR-ROPER, *A HIDDEN LIFE: THE ENIGMA OF SIR EDWARD BACKHOUSE* (1976)); women, see Mary Beth Norton, *The Pattern in "The Yellow Wallpaper,"* N.Y. Times, July 15, 1990, § 7 (Book Review), at 10, col. 1 (reviewing ANN J. LANE, *TO "HERLAND" AND BEYOND: THE LIFE AND WORK OF CHARLOTTE PERKINS GILMAN* (1990)); men, children, all races, see, e.g., Noel C. Manganyi, *Biography: The Black South African Connection*, in NEW DIRECTIONS IN BIOGRAPHY, *supra*, at 52; John Patrick Diggins, "I Walk in Dignity," N.Y. Times, Feb. 12, 1989, § 7 (Book Review), at 1, col. 1 (reviewing MARTIN BAUML DUBERMAN, *PAUL ROBESON: A BIOGRAPHY* (1989)); social classes, see Frank E. Vandiver, *Biography as an Agent of Humanism*, in THE BIOGRAPHER'S GIFT: LIFE HISTORIES AND HUMANISM 3-20 (J. Veninga ed. 1983) [hereinafter THE BIOGRAPHER'S GIFT]; and interests, see *id.* at 7 (noting the proliferation of biographies about scientists).

19. At times, the legal restrictions may seem a minor hindrance when compared to human stubbornness and deterrence. Biographers have been known to joke that the first rule in biography is "kill the widow." For example, William Allen White gave this advice to historian Walter Johnson. See JOHN A. GARRATY, *THE NATURE OF BIOGRAPHY* 171 (1957). White's advice came from experience. The widows of Presidents Woodrow Wilson and Calvin Coolidge had asked friends and acquaintances of both men not to cooperate with White on his work on the lives of Wilson and Coolidge. *Id.* at 171 n.3.

Widows may have become the target of biographers because women, as a general rule, outlive men, and thus are often the custodians of their late husbands' papers. Moreover, until recently, men, not women, were the predominant subjects of biography, perhaps because of "masculinist (generally heterosexual) cultural expectations." W. EPSTEIN, *supra* note 4, at 169. The "widow as obstacle" stereotype persists. See Pierre N. Leval, *Toward a Fair Use Standard*, 103 HARV. L. REV. 1105, 1118 (1990) (discussing the "widow censor"—heirs and executors who can regulate quotation or close paraphrasing from personal papers of deceased public figures for fifty years after their death).

20. N.Y. Times, Sept. 17, 1989, § 7 (Book Review), at 1, 37, col. 2 (quoting VLADIMIR NABOKOV: *SELECTED LETTERS, 1940-1977* (D. Nabokov & M. Bruccoli eds. 1989)).

21. See, e.g., *Wright v. Warner Books, Inc.*, 748 F. Supp. 105 (S.D.N.Y. 1990) (copyright infringement action against publishers of MARGARET WALKER, *RICHARD WRIGHT, DAEMONIC GENIUS* (1988), by Ellen Wright, Richard Wright's widow); *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988) (copyright infringement action against publishers of RUSSELL MILLER, *BARE-FACED MESSIAH: THE TRUE STORY OF L. RON HUBBARD* (1988), by corporation holding copyright to Hubbard's papers), *aff'd on other grounds*, 873 F.2d 576 (2d Cir. 1989), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990); *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986) (copyright infringement action against publisher of IAN HAMILTON, J.D. SALINGER: *A WRITING LIFE* (1988), initiated by Salinger), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987).

22. See, e.g., *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973); 381 F. Supp. 29 (S.D.N.Y. 1974); 417 F. Supp. 1201 (S.D.N.Y. 1976) (infringement action against Louis Nizer, for his book, *The Implosion Conspiracy*, initiated by sons of Ethel and Julius Rosenberg for Nizer's use of the Rosenbergs' published letters), *aff'd in part, rev'd in part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978); *Rosemont Enters., Inc. v. Random House, Inc.*, 256 F. Supp. 55 (S.D.N.Y. 1966) (infringement action by Howard Hughes against Random House for publishing a biography of Hughes that used articles from a magazine owned by Hughes), *rev'd*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967); *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 279 N.Y.S.2d 51 (Sup. Ct.) (common law copyright infringement action against publisher of A.E. Hotchner's Hemingway biography for use of published and unpublished materials), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968); *Folsom v. Marsh*, 9 Fed. Cas. 342 (C.C.D. Mass. 1841) (No. 4901) (copy-

conversations,²⁵ and breach of contract.²⁶ They, in turn, have sued other authors for use of their material in later books.²⁷ Biographers have been embroiled in disputes involving the attorney-client privilege²⁸ and the right of access to document collections.²⁹ Even biographical films have provoked

right infringement action against "biographer" of George Washington by holders of copyright to Washington's letters).

23. See, e.g., *Mitchell v. Random House*, 703 F. Supp. 1250 (S.D. Miss. 1988) (publishers of history of Elvis Presley's secret married life, *Are You Lonesome Tonight?: The Untold Story of Elvis Presley's One True Love and the Child He Never Knew*, sued by a woman whom the author claimed had been forced to marry her own middle-aged brother when she was eleven), *aff'd*, 865 F.2d 664 (5th Cir. 1989); cf. *Ross v. Esquire*, 94 F.2d 75 (2d Cir. 1938) (Frank Harris's attorney sued a ghostwriter who, in an article appearing in *Esquire* magazine, claimed he had ghostwritten Harris's biography of George Bernard Shaw; libel involved ghostwriter's accusation that attorney had cheated him out of fee); *Washington Post*, June 20, 1989, at C1, col. 1 (discussing successful attempt by sons of Italian admiral to compel David Brinkley, by threat of legal action, to change his depiction of their father in *WASHINGTON GOES TO WAR* (1988)).

24. See, e.g., *Fasching v. Kallinger*, 211 N.J. Super. 26, 510 A.2d 694 (App. Div. 1986) (state law privacy action against biographer of a murderer by parents and sister of the subject's victim); *Rosemont Enters., Inc. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968) (state privacy action against Random House by Howard Hughes), *aff'd*, 32 A.D.2d 892, 301 N.Y.S.2d 948 (App. Div. 1969); *Spahn v. Julian Messner, Inc.*, 43 Misc. 2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964) (state privacy action by subject of Milton J. Shapiro's *The Warren Spahn Story* against publishers), *aff'd*, 23 A.D.2d 216, 260 N.Y.S.2d 451 (App. Div. 1965), *aff'd*, 18 N.Y.2d 324, 221 N.E.2d 543, 274 N.Y.S.2d 877 (1966), *vacated*, 387 U.S. 239, *reargued*, 21 N.Y.2d 124, 233 N.E.2d 840, 286 N.Y.S.2d 832 (1967), *appeal dismissed*, 393 U.S. 1046 (1969); *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S. 2d 779 (Sup. Ct. 1947) (state privacy action against unauthorized biography of conductor Serge Koussevitzky).

25. See *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 279 N.Y.S.2d 51 (Sup. Ct.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd*, 23 N.Y.2d 341, 244 N.E.2d 250, 296 N.Y.S.2d 771 (1968).

26. See, e.g., *Cameron Harvey & Linda Vincent, MacKenzie and LeSueur: Historians' Rights*, 10 MANITOBA L.J. 281, 285-87 (1980).

27. See, e.g., *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987) (infringement action against author of biography of Igor Stravinsky by author and copyright holder of numerous books written with and about Stravinsky); *Toksvig v. Bruce Publishing Co.*, 181 F.2d 664 (7th Cir. 1950) (author of biography of Hans Christian Andersen based on Danish documents sued author of a novelized story of Andersen's life).

28. See David A. Kaplan, *A Matter of Truth or Confidences: Does Attorney-Client Privilege Outweigh Demands of History?*, NAT'L L.J., July 4, 1988, at 36 (examining debate concerning historians' access to legal documents in which the legal issues discussed have long been moot).

29. See, e.g., *American Library Ass'n v. Faurer*, 631 F. Supp. 416 (D.C.D.C.) (researcher sued director of National Security Agency for making previously available documents nonaccessible for reasons of national security), *aff'd sub nom. American Library Ass'n v. Odom*, 818 F.2d 81 (D.C. Cir. 1987); cf. *Wilkinson v. FBI*, 111 F.R.D. 432 (C.D. Cal. 1986) (motion by civil rights groups for a protective order to bar the FBI's access to papers that had been conditionally restricted by the State Historical Society of Wisconsin).

In *Wilkinson*, the FBI sought access to the papers of Anne Braden, a member of the National Committee Against Repressive Legislation. Braden's attorneys argued that "the First Amendment provides a privilege against disclosure of information through the discovery process." Notice of Motion and Motion for Protective Order, Memorandum of Points and Authorities 7, *Wilkinson* (No. CV 80-1048 AWT (TX)). In addition, an amicus curiae brief on behalf of archivists, historians, and academics argued that privileges were not waived by allowing restricted access to papers placed in archives. See Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Protective Order 10-14. The district court held that a privilege existed with respect to associational activities, but that Braden had not demonstrated that it should apply in this case. See *Wilkinson*, 111 F.R.D. at 436. The court also refused to create a broad archival privilege. *Id.* at 437-38. For an account of the case, see Harold L. Miller, *Will Access Restrictions Hold Up in Court? The FBI's Attempt to Use the Braden Papers At the State Historical Society of Wisconsin*, 52 AM. ARCHIVIST 180, 181-84 (1989).

lawsuits.³⁰ At times, courts have quoted biographers as special masters.³¹ This article does not address all restrictions on biographers, only those involving the use of unpublished materials, including letters, diaries, annotations in books, and scribbled notes.

In 1987, New Era Publications, which held the copyright in the writings of L. Ron Hubbard, founder of the Church of Scientology, sued to enjoin the publication of a posthumous biography of Hubbard, written by Russell Miller, entitled *Bare-Faced Messiah: The True Story of L. Ron Hubbard*.³² The case typifies the problem of the use of unpublished expression and has become the center of recent controversy.³³ It involved Miller's extensive quotation of Hubbard's unpublished letters and diaries.³⁴ Miller's publisher, the named defendant, argued that the quotations were designed to demonstrate "through Hubbard's words . . . his flaws of character."³⁵ The district court judge, Pierre N. Leval, found the majority of the quotations protected by the copyright statute's fair use provision.³⁶ Judge Leval interpreted pre-

30. See, e.g., *Roy Export Co. v. Columbia Broadcasting Sys.*, 503 F. Supp. 1137 (S.D.N.Y. 1980) (infringement action by copyright holder of Charlie Chaplin movies against broadcasting network over film biography of Chaplin that used filmclips from his movies), *aff'd*, 672 F.2d 1095 (2d Cir.), *cert. denied*, 459 U.S. 826 (1982); *Iowa State Univ. Research Found., Inc. v. American Broadcasting Cos.*, 463 F. Supp. 902 (S.D.N.Y. 1978) (creator of biographical film about a student wrestler sued broadcasting companies for unauthorized use of film clips on national television), *aff'd*, 621 F.2d 57 (2d Cir. 1980).

31. See, e.g., *United States v. Michigan*, 471 F. Supp. 192, 249 (W.D. Mich. 1979) (supporting an argument about the importance of Justice John McLean's dissent in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1856) by citing his biographer); *Fireman's Fund Am. Ins. Co. v. Boston Harbor Marina, Inc.*, 285 F. Supp. 36, 40 (D. Mass. 1968) (citing 1 WILLIAM W. STORY, *THE LIFE AND LETTERS OF JOSEPH STORY* (1851) to support argument about importance of an opinion by Justice Story); *Grove Press, Inc. v. Christenberry*, 276 F.2d 433, 437 n.6 (2d Cir. 1960) (noting, in affirming decision to enjoin the Postmaster General's order refusing to allow the mailing of D.H. Lawrence's *Lady Chatterly's Lover*, that Harry T. Moore, Lawrence's biographer, called the book "our time's most significant romance"); *United States ex rel. Kling v. La Vallee*, 188 F. Supp. 470, 473 (N.D.N.Y. 1960) (stating that an infamous bank robber's disavowal of the petitioner's guilt lacked credibility because the bank robber had told his biographer that he had not participated in robbery).

32. *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd on other grounds*, 873 F.2d 576 (2d Cir.), *reh'g denied en banc*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S. Ct. 1168 (1990). The *New Era* opinions and Judge Leval's unpublished appendix (over 70 pages of comparisons and tables) appear together in 37 J. COPYRIGHT SOC'Y 49-214 (1989).

33. See notes 5-6 *supra* and accompanying text. A related case, *New Era Publications, Int'l v. Carol Publishing Group*, 792 F. Supp. 992 (S.D.N.Y.), *aff'd in part, rev'd in part*, 904 F.2d 152 (2d Cir. 1990), reassured followers of the controversy that only the use of unpublished materials were at issue. The case involved the quotation of Hubbard's published material in JONATHAN CAVENATACK, *A PIECE OF BLUE SKY: SCIENTOLOGY, DIANETICS AND L. RON HUBBARD EXPOSED* (1985). The Second Circuit, in an opinion written by Judge Wilfred Feinberg, overturned the district court's permanent injunction barring publication. The panel found that even epigraphs of Hubbard quotes constituted fair use. See also *Publisher Victorious on Hubbard Biography*, N.Y. Times, May 27, 1990, at A24, col. 5; Debra Squires, *Quotes Upheld Under "Fair Use,"* N.Y.L.J., May 25, 1990, at 1, col. 1.

34. *New Era*, 695 F. Supp. at 1498. The Church of Scientology may have been motivated to sue because it disliked Miller's critical portrayal of Hubbard. See *id.* at 1499 n.2. The plaintiff offered 43 pages of tables listing uses of unpublished materials. *Id.* at 1498. The district court noted probable overcounting. *Id.* at 1521. The dispute did not focus on quotations from published materials. See *id.* at 1498, 1523.

35. *Id.* at 1498. The book aimed to show that "Hubbard was dishonest, pretentious, boastful, paranoid, cowardly, cruel, disloyal, aggressive, bizarre and finally even insane . . ." *Id.*

36. *Id.* at 1520, 1524. The 1976 Copyright Act states:

vious cases to permit fair use when the "point cannot be effectively made by merely reciting the facts."³⁷ No fair use, however, would be permitted merely "to make the biography more vivid."³⁸ Judge Leval did not consider Hubbard's privacy interests, stating that copyright law did not address privacy issues; however, in a somewhat contradictory statement, he added that fair use analysis could include privacy interests in certain circumstances.³⁹ Citing free speech interests, Judge Leval refused to grant an injunction.⁴⁰

A majority (Judges Roger J. Miner and Frank X. Altimari) of a panel of the Second Circuit disagreed with Judge Leval's analysis, but not his result. The court stated that "unpublished works normally enjoy complete protection."⁴¹ Although "complete protection" would have resulted in an injunction against the book's publication, the court denied the injunction under the theory of laches.⁴² Chief Judge James L. Oakes concurred but advocated an analysis closer to that offered by Judge Leval.⁴³

... the fair use of a copyrighted work . . . is not an infringement of copyright. In determining whether the use made of a work in any particular case is fair use the factors to be considered shall include—

- (1) the purpose and character of the use . . . ;
- (2) the nature of the copyrighted work;
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1988). Judge Leval found that "there is a body of material of small, but more than negligible size, which, given the strong presumption against fair use of unpublished material, cannot be held to pass the fair use test." *New Era*, 695 F. Supp. at 1524. Most of the uses, however, were found to be acceptable.

37. *New Era*, 695 F. Supp. at 1502-03. Hence, Miller was permitted to demonstrate the following: "The Church's False Mythology of the Founder," *id.* at 1508; "Hubbard Dishonesty," *id.* at 1509; "Boastfulness, Pomposity, Grandiosity, Pretension, Self-Importance," *id.* at 1511; "Paranoia," *id.* at 1512; "Snobbery, Bigotry, Disdain for Asians," *id.*; "Cruelty, Disloyalty," *id.* at 1513; "Aggressiveness, Vicious and Scheming Tactics," *id.*; "Cynicism," *id.* at 1514; "Derangement, Insanity, Bizarre Psuedo-Science," *id.* at 1515; "Self-Presentation in Early Diaries," *id.* at 1517; "Accurate Rendition of Idea," *id.* at 1518; and "Early Writing Style." *Id.*

38. *Id.* at 1503; *see also id.* at 1523.

39. "If the protected document is highly personal, private and intimate, if the author has a strong personal interest in deferring publication, if the public interest in the contents is minimal and voyeuristic at best . . . those might well be factors disfavoring a finding of fair use." *Id.* at 1505.

40. *Id.* at 1527 ("When the interests protected by the copyright are in acute conflict with those represented by the First Amendment . . . an award of damages . . . can protect the copyright holder with far less injury to . . . freedom of speech than an injunction.").

41. *New Era Publications, Int'l v. Henry Holt & Co.*, 873 F.2d 576, 583 (2d Cir. 1989). The court did not go so far as to hold *no* fair use for unpublished works, noting only a "strong presumption" against fair use. *Id.* Although Judge Leval had also noted a "strong presumption," *New Era*, 695 F. Supp. at 1524, the Second Circuit found that the presumption led to three of the four fair use factors—the nature of the copyrighted work, the amount and substantiality of the portion used, and the effect of the use on the market—weighing in favor of *New Era*. *New Era*, 873 F.2d at 583.

42. *New Era*, 873 F.2d at 584-85. *New Era* had waited until two years after learning that Miller's book would be published before it had brought an action. Such conduct, the court held, constituted "unreasonable and inexcusable delay." *Id.* at 584. Although deciding the case on an equitable technicality, the court rejected Holt's free speech claims: "the fair use doctrine encompasses all claims of first amendment in the copyright field . . ." *Id.*; *cf.* note 40 *supra* and accompanying text. It also noted that, but for laches, an injunction would have issued because the public would have been deprived only of an "infringing" historical study. *New Era*, 873 F.2d at 584.

43. Judge Oakes agreed with Judge Leval that "words that are facts calling for comment are

The Second Circuit's decision in *New Era* narrowed the already restricted ability of biographers to use unpublished documents established by the Supreme Court's decision in *Harper & Row Publishers, Inc. v. Nation Enterprises*⁴⁴ and the Second Circuit's earlier decision in *Salinger v. Random House, Inc.*⁴⁵ Although factual backgrounds appear to make these two decisions inapposite to typical posthumous biographies,⁴⁶ their underlying legal analyses, when combined with *New Era*, confront biographers with the problem, as one writer put it, of writing "history in a straitjacket."⁴⁷

In the months following the *New Era* decision, the case and its *Harper &*

distinguishable from words that simply enliven text. The law recognizes that words themselves may be facts to be proved." *New Era*, 873 F.2d at 592. Although finding the court bound to observe a narrower scope for fair use of unpublished documents, he emphasized that an absolute ban did not exist. *Id.* at 593. Judge Oakes stated that "[r]esponsible biographers and historians constantly use primary sources, letters, diaries and memoranda. Indeed, it would be *irresponsible* to ignore such sources of information." *Id.* at 596. He would have upheld the denial of an injunction on traditional equitable grounds. *Id.* at 596-98.

44. 471 U.S. 539 (1985). In *Harper & Row*, the Supreme Court held that quotation by *The Nation* of portions of President Gerald Ford's unpublished manuscript of his memoirs—which were about to be excerpted in *Time* magazine and *Reader's Digest* before their complete publication by Harper & Row—did not constitute fair use and thus infringed on Harper & Row's copyright. *See id.* at 569. The Court stated that the "unpublished nature of a work is '[a] key, though not necessarily determinative factor' tending to negate a defense of fair use." *Id.* at 554 (quoting S. REP. NO. 473, 94th Cong., 1st Sess. 64 (1975)). The Court noted that the copyright statute encompassed first amendment interests. *See id.* at 559-60. The magazine paid damages. For detailed discussion, see Jay Dratler, Jr., *Distilling the Witches' Brew of Fair Use in Copyright Law*, 43 U. MIAMI L. REV. 233, 270-77 (1988); William W. Fisher III, *Reconstructing the Fair Use Doctrine*, 101 HARV. L. REV. 1659, 1664-95 (1988).

45. 811 F.2d 90 (2d Cir.), *reh'g denied*, 818 F.2d 252 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987). In *Salinger*, the Second Circuit (Judges Jon O. Newman and Roger J. Miner) reversed the district court (Judge Pierre N. Leval) and held that Ian Hamilton's biography, *J.D. Salinger: A Writing Life*, infringed J.D. Salinger's copyright in letters by him and held in library collections. 811 F.2d at 92. The court found that unpublished "works normally enjoy complete protection against copying any protected expression." *Id.* at 97. It noted, but rejected, an alternative interpretation of fair use that would have permitted the use of less significant amounts of unpublished as opposed to published material. *Id.*

For criticism of the Second Circuit's decision, see Vincent H. Peppe, *Fair Use of Unpublished Materials in the Second Circuit: The Letters of the Law—Salinger v. Random House*, 54 BROOKLYN L. REV. 417 (1988) (student author); David J. Cowan, *Salinger v. Random House: Is Copyright Protection of Letters Meant to Serve the Public or Their Author?*, 10 HASTINGS COMM/ENT L.J. 941 (1988) (student author). But see Roger L. Zissu, *Salinger and Random House Part II: Fears, Criticisms of Opinion Result from Misreading of Decision*, 35 J. COPYRIGHT SOC'Y 189 (1988).

Hamilton rewrote his book, excising the quotations and including a narrative of his legal tribulations. As one blurb on the back cover of the book noted, the biography is "probably a lot more entertaining than either of the versions he had written before Salinger and his attorneys intervened." IAN HAMILTON, IN SEARCH OF J.D. SALINGER (1988) (quoting John Blades, *Salinger Biographer Finally Gets His Man*, Chicago Tribune, May 8, 1988 at 3, col. 4).

46. *Salinger* may be distinguishable because Salinger had made public his desire for privacy, *see New Era*, 873 F.2d at 585 (Oakes, J., concurring); *Salinger*, 811 F.2d at 92; *Wright v. Warner Books, Inc.*, 748 F. Supp. 105, 111 (S.D.N.Y. 1990) ("what motivated the Court of Appeals in *Salinger*, at least in part, was concern over J.D. Salinger's right to privacy"); I. HAMILTON, *supra* note 45, at 4, 7-9. *Harper & Row* may be distinguishable because *The Nation* scooped the authorized publication of the memoirs in *Time* magazine and *Reader's Digest*. *See Harper & Row*, 471 U.S. at 543; note 44 *supra*.

47. David Kaplan, *The End of History? A Copyright Controversy Leads to Self-Censorship*, NEWSWEEK, Dec. 25, 1989, at 80, col. 3. *New Era* created the fear that the use of any unpublished expression would fail the Second Circuit's gloss on the four factor fair use test. *See Hearings, supra* note 6 (statement of Floyd Abrams).

Row-Salinger parentage became an oft-examined trinity in the press. Articles, mostly critical, chanted the litany of the four fair use factors, disputed the opinions, and teased readers with hints of scandals buried by legal technicalities.⁴⁸ Controversy also continued on the judicial front. The Second Circuit's denial of a petition to rehear the *New Era* case⁴⁹ was accompanied by a "highly unusual and unusually acerbic"⁵⁰ dissent by Judge Jon O. Newman. Judge Newman—who had written in *Salinger* that unpublished expression "normally enjoy[s] complete protection"⁵¹—criticized the panel majority for not "confin[ing] its opinion to that unexceptional conclusion" that laches barred a preliminary injunction.⁵² Nevertheless, the dissent discussed the broader issues covered in the panel opinion with the hope of "allay[ing] . . . misunderstanding."⁵³ The majority opinion, while denying rehearing, sought to reassure biographers and journalists that *New Era* did not curtail "their right to report facts contained in unpublished writings, even if some brief quotation of expressive content is necessary to report those facts accurately."⁵⁴ Despite the judicial efforts, confusion reigned. The claims of Judge Miner and Judge Newman that their respective opinion and dissent reflected the uncontroversial view of the Circuit, the differences between the two *New Era* opinions, and the confusing position of Judge Newman, author of the *Salinger* opinion and the dissent from the denial to rehear *New Era*, did little to alleviate discomfort.⁵⁵

And if predicting the Second Circuit's position were not difficult enough, the principal judges "[u]npredictably . . . avail[ed] themselves of the oppor-

48. See, e.g., Leon Friedman, *Copyright Wrongs*, NATION, Mar. 19, 1990, at 368; R.Z. Shepard, *Foul Weather for Fair Use*, TIME, Apr. 30, 1990, at 86; J. Anthony Lukas, *A Ruling that Hobbles Historians*, N.Y. Times, July 27, 1990, at A27, col. 2; Ralph Oman, *Protecting Franny & Zooey*, L.A. Times, July 13, 1990, at B7, col. 1; Martin Flumenbaum & Brad S. Karp, "Fair Use" Under Federal Copyright Law, N.Y.L.J., June 27, 1990, at 3, col. 1; David Goldberg & Robert J. Bernstein, "New Era" Revisited, N.Y.L.J., June 27, 1990, at 3, col. 2; Amy Gamberman, *Unfair Use: Copyright Decision Cramps Writers' Style*, Wall St. J., Apr. 10, 1990, at A20; Bob Sipchen, *Who is the Owner of the Written Word?*, L.A. Times, Mar. 12, 1990, at E1, col. 2; Peter Edelman, *Copyright Case Not One for History Books*, Legal Times, Mar. 5, 1990, at 22, col. 1; M.R. Montgomery, *High Court Stays Out of Copyright Fight*, Boston Globe, Feb. 21, 1990, at 41, col. 1; Kaplan, *supra* note 47.

49. *New Era Publications, Int'l v. Henry Holt & Co.*, 884 F.2d 659 (1989). Judge Miner wrote again for the court.

50. Flumenbaum & Karp, *supra* note 48, at 6, col. 3.

51. *Salinger v. Random House, Inc.*, 811 F.2d 90, 97 (2d Cir. 1987).

52. *New Era*, 884 F.2d at 662 (Newman, J., dissenting from denial of rehearing *en banc*). Chief Judge Oakes, who had concurred with the result in the critical *New Era* opinion, 873 F.2d at 585-98, joined Judge Newman along with two other judges in dissenting from the denial of rehearing *en banc*.

53. *New Era*, 884 F.2d at 662.

54. *Id.* at 663.

55. Judge Walker's decision in *Wright* betrays this judicial discomfort. Judge Walker found no copyright infringement for the use of Richard Wright's unpublished papers. The opinion struggles to make the second fair use factor favor the defendant. Judge Walker wrote, "the works' status as published or unpublished is just one—albeit a 'critical,' *Harper & Row*, 471 U.S. at 564—aspect." 748 F. Supp. 105, 110 (S.D.N.Y. 1990). Having wiggled out of the *Harper & Row* stranglehold (in a move Houdini would have admired), Judge Walker concluded that the defendant's paraphrasing had significance. Then to escape *Salinger*, Judge Walker found that in *Wright*, the paraphrasing involved "factual" rather than personal paraphrasing. Whether the Second Circuit (assuming the case is appealed) will approve of Judge Walker's analysis should be interesting.

tunity to give lectures and publish articles about the issues raised"⁵⁶ Although these articles⁵⁷ reiterated the general positions stated by the judges in their published opinions, the expansive discussion of the issues, the attacks and defenses of prior opinions, and the rhetorical flair of the authors created an intriguing, albeit occasionally exasperating, question of jurisprudence.

The use of unpublished materials in biographies and other writings had generated substantial academic⁵⁸ and general⁵⁹ commentary even prior to *New Era*. But the *New Era* decision and its coverage in the popular press rekindled feelings smoldering since *Salinger*.

Not surprisingly, Congress entered the fray. In March 1990, after the Supreme Court denied certiorari in *New Era*, Representative Robert W. Kastenmeier (D-Wis.) and Senator Paul Simon (D-Ill.) introduced H.R. 4263 and S. 3549.⁶⁰ These bills sought to "clarify that . . . [the fair use section of the copyright law] applies to both published and unpublished works."⁶¹ The July hearings on the bills raised concerns over whether legislative action was advisable prior to further judicial action, and whether the proposed amendment would accomplish its intended purpose.⁶² In August and September, alternative language proposed that fair use for unpublished materials be limited to "history, biography, fiction, news and general interest reporting, or social, political or moral commentary."⁶³ But in early Octo-

56. *Hearings, supra* note 6, at 47-48 (statement of Ralph Oman, Register of Copyrights and Assistant Librarian for Copyright Services); *see also* *New Era Publications v. Carol Publishing Group*, 904 F.2d 152, 155 (2d Cir. 1990) (including comments on the articles by the Second Circuit judges).

57. *See, e.g.,* Leval, *supra* note 19; Roger J. Miner, *Exploiting Stolen Text: Fair Use or Foul Play?*, 37 J. COPYRIGHT SOC'Y 1 (1989); Jon O. Newman, *Not the End of History: The Second Circuit Struggles with Fair Use*, 37 J. COPYRIGHT SOC'Y 12 (1989); James L. Oakes, *Copyrights and Copyremedies: Unfair Use and Injunctions*, — HOFSTRA L. REV. — (forthcoming).

58. *See, e.g.,* Michael Les Benedict, *Historians and the Continuing Controversy over Fair Use of Unpublished Manuscript Materials*, 91 AM. HIST. REV. 859 (1986); Robert C. Hauhart, *Copyrighting Personal Letters, Diaries, and Memorabilia: A Review and A Suggestion*, 13 U. BALT. L. REV. 244 (1984); John M. Kernochan, *Protection of Unpublished Works in the United States Before and After the Nation Case*, 33 J. COPYRIGHT SOC'Y 322 (1986); William Strauss, *Protection of Unpublished Works* (1957), in 1 STUDIES ON COPYRIGHT 189 (Arthur Fisher Memorial ed. 1963); Jane Tucker Dana, *Copyright and Privacy Protection of Unpublished Works—The Author's Dilemma*, 13 COLUM. J. L. & SOC. PROBS. 351 (1977) (student author); *Peppe, supra* note 45; John L. Wilson, *The Scholar and the Copyright Law*, 10 COPYRIGHT L. SYMP. (ASCAP) 104, 113-21 (1959) (student author).

59. *See, e.g.,* James Atlas, *Speaking Ill of the Dead*, N.Y. Times, Nov. 6, 1988, § 6 (Magazine), at 40, col. 1 (examining ethics of "pathographies"—biographies that focus on the failures and anxieties of their subjects); Caryn James, *The Fate of Joyce Family Letters Causes Angry Literary Debate*, N.Y. Times, Aug. 15, 1988, at C11, col. 1 (discussing James Joyce's grandson's destruction of letters from Joyce's daughter).

60. *See* note 5 *supra*.

61. The bills proposed adding to the existing law the words "whether published or unpublished." H.R. 4263, *supra* note 5, 136 CONG. REC. H805-07, H830; S. 2370, *supra* note 5, at 136 CONG. REC. S3549-50.

62. Statements were submitted by Judges Oakes, Miner, and Leval; copyright lawyers Jonathan Lubell, Ralph Oman, William F. Patry, and Barbara Ringer; first amendment litigator Floyd Abrams; and two authors, Taylor Branch and J. Anthony Lukas. *See Hearings, supra* note 6; *see also* *Washington Insider (BNA)*, July 12, 1990 (summarizing the hearing testimony).

63. N.Y. Times, Oct. 5, 1990, at 1, 11, col. 1.

ber, Senator Orrin G. Hatch (R-Utah) "abruptly prevented the bill from being placed on the agenda for a vote."⁶⁴ Whether the bills will be reintroduced after the congressional adjournment is unknown.

The brouhaha surrounding the judicial decisions and the congressional hearings might have seemed disproportionate to the apparent number of people affected by the legal doctrine involving use of unpublished materials: a few biographers inconvenienced by rewriting several sentences in forthcoming books. This perception, however, would be misguided, for the concerns underlying the legal issues implicate our understanding of history and privacy. On one side stand those who foresee the death of biography and history. Arthur M. Schlesinger, Jr., wrote that the *New Era* decision "strikes a blow against the whole historical enterprise."⁶⁵ On the other side, families, heirs, and even the subjects themselves plead for privacy and their right not to have unpublished writings revealed to a curious public. Bernard Malamud's daughter, Janna Malamud Smith, in discussing her struggle over whether to burn or save her father's papers, wrote that "[g]ossipy biographies . . . can extract a high and often hidden price in exchange for satisfying our curiosity. . . . When a biographer reveals . . . details to a massive audience, one's life is witnessed, but without the love, loyalty or privacy that makes revelation meaningful."⁶⁶ Although disagreement on the issue exists, it is not as vehement as it first appears. Most observers eschew extreme positions, believing in neither an absolute right to use unpublished materials nor a ban on all material that heirs or executors would prefer not to see in print.⁶⁷

64. *Id.* at 11, col. 2. Pressure from computer software companies may have contributed to the bills' scuttling. *Id.*

65. Wall St. J., Oct. 26, 1989, at § 1, 16, col. 3. Schlesinger also observed that "[i]f the law were this way when I wrote the three volumes of 'The Age of Roosevelt' . . . I might be two volumes short." Kaplan, *supra* note 47, at 80.

66. Janna Malamud Smith, *Where Does a Writer's Family Draw the Line?*, N.Y. Times, Nov. 5, 1989, § 7 (Book Review), at 1, 43, col. 2, 44, col. 4. Other families have faced this dilemma. Stephen Joyce, James Joyce's grandson, destroyed letters from James Joyce's aunt to his grandfather. Joyce scholars and readers criticized his action. See N.Y. Times, Dec. 31, 1989, § 7 (Book Review), at 2, col. 1 ("[I] firmly believe that there is a part of every man or woman's life, no matter how famous he or she may be, that should remain private."); N.Y. Times, Aug. 15, 1988, at C11, col. 1; cf. Carolyn Kizer, *Passion Was the One Great Presence*, N.Y. Times, Feb. 25, 1990, § 7 (Book Review), at 14, 18, col. 1 (terming PAUL MARIANI, *DREAM SONG: THE LIFE OF JOHN BERRYMAN* (1990) a "binge-by-binge biography").

Some families no doubt consider the "high price" to refer as much to lost royalties as to revealing publications. In this article, I do not address economic motivations for the legal doctrines restricting the use of unpublished materials. I do not mean by this omission to imply that economic considerations are irrelevant, for they are not. Cf. Fisher, *supra* note 44, at 1698-1744 (employing an economic analysis to examine fair use doctrine); Wendy J. Gordon, *An Inquiry into The Merits of Copyright: The Challenges of Consistency, Consent, and Encouragement Theory*, 41 STAN. L. REV. 1343, 1438 (1989) (analyzing encouragement theorists, persons who believe copyright "is justified only to the extent that it encourages authors to generate new works"). But economic concerns neither trump nor delegitimize other concerns, and for a noneconomist, the costs of embarking on such an endeavor far outweigh any benefit to the reader. Hence, my article focuses on the legal acceptance of broad ideas about privacy and history and the noneconomic consequences for biographers, subjects, and society.

67. See, e.g., *New Era*, 695 F. Supp. at 1505 (discussing possible fair use consideration of privacy interests); *Salinger*, 811 F.2d at 100 (noting "special circumstances as might fall within the

Nevertheless, the legal law of biography appears to make onerous, and may even foreclose,⁶⁸ the use of unpublished expression without consent of the copyright holder.⁶⁹ The practical effect of this limitation on biographers remains substantially unknown. Biographies often take years to research and write;⁷⁰ and authors, believing that either a fair use privilege exists or the family will acquiesce, may not consult a lawyer until they attempt to publish. Early indications suggest that biographers and publishers, fearing damages and injunctions, are refusing to pursue biographies that involve unpublished materials.⁷¹

In this article, I explore the relation between the legal law of biography and the literary theory of biography, and concern myself not so much with precise contours as with the biography envisioned and permitted by these doctrines. These issues are relevant to other literary enterprises, such as nonbiographical historical scholarship, political criticism, fiction, and journalism.⁷² I focus, however, only on the use of unpublished materials in writ-

'narrower' scope of fair use available for unpublished works"); Benedict, *supra* note 58, at 381 (noting the need to promote the interests of both scholars and heirs); Smith, *supra* note 66, at 43, col. 2 (Janna Malamud Smith asking, "What do we, his family, want people to know while we are still alive? And to what information do biographers have legitimate entitlement?"); Interview with John Milton Cooper, Professor and Chairman, Department of History, University of Wisconsin-Madison Department of History, in Madison, Wis. (Aug. 11, 1989); Interview with Andrew L. Kaufman, Professor, Harvard Law School, in Cambridge, Mass. (Dec. 20, 1989); Interview with Linda Simon, Director, Harvard Writing Center, in Cambridge, Mass. (Nov. 6, 1989).

68. See *Hearings*, *supra* note 6 (statement of Floyd Abrams) (noting that if the defendant loses on the second fair use factor—nature of the copyrighted material—he or she will, in effect, lose the entire four factor test).

69. One writer dramatically stated that "[t]he [New Era] court held that quoting almost anything unpublished, regardless of commercial value, presumptively violated a copyright. In such cases, judges must automatically issue an injunction and block publication." Kaplan, *supra* note 47, at 80 (emphasis in original). Whether permissible uses of unpublished documents remain is unclear. Presumably, uses such as defense of reputation or proof of innocence would be accepted. See note 146 *infra*.

70. The biography of Langston Hughes took Arnold Rampersad ten years to write. Talk by Arnold Rampersad, Harvard Law School (Apr. 7, 1990). The biography of Lyndon B. Johnson has taken Robert Caro over twelve years, and that of Edna St. Vincent Millay has taken Nancy Milford fourteen years. See Atlas, *supra* note 59, at 40, col. 1; Chron. Higher Educ. Nov. 15, 1989, at A4, A6, col. 2 (noting the "snail's pace of most scholarly projects").

71. See, e.g., Chron. Higher Educ., *supra* note 70, at A6, cols. 1 & 2 (discussing the cancellation of works on James Agee and Simone de Beauvoir after *Salinger*); Kaplan, *supra* note 47 (stating that James Reston, Jr., deleted sections of his biography on John Connally that quoted from Connally's letters, and that, in Ed Koch's collection of his mayoral letters, Koch chose not to include quotes from the letters prompting his responses); N.Y. Times, Oct. 13, 1990, at 1, col. 2 (quoting Harriet Dorsen, general counsel of Bantam Doubleday Dell: "There is hardly a non-fiction book that comes across my desk that does not have some problem with unpublished materials in it. You take a risk if you quote from any unpublished documents without permission."); cf. Gamberman, *supra* note 48 (recording the problems faced by biographers of Malcolm X and Richard Wright). But see Chron. Higher Educ., *supra* note 70, at A6, cols. 1-2 (noting that "the number of specific problems that have surfaced is relatively small").

72. Similar problems arise in fictionalized accounts of history in movies, see, e.g., N.Y. Times, Dec. 15, 1989, at C18, col. 1 (director of *Glory* read 2000 letters written by Civil War colonel depicted in the film); N.Y. Times, Nov. 26, 1989, § 2, at 1, col. 1 (asking "Can Movies Teach History?"); in autobiography, see, e.g., Miranda Seymour, N.Y. Times, Nov. 5, 1989, § 7 (Book Review), at 30, col. 2 (reviewer of HERBERT LEIBOWITZ, *FABRICATING LIVES: EXPLORATIONS IN AMERICAN AUTOBIOGRAPHY* (1989), raising the issue of historical objectivity in expression: "[A]utobiography is an honorable name for the dishonorable art of reinventing the past."); Henry

ten biographies. Some writers have suggested that future biographers will not face this problem because people in the late twentieth century write fewer personal letters, preferring the telephone or computer mail.⁷³ But the ease of computer printouts and fax machines and the permanence of computer storage indicate that similar concerns will remain, perhaps with greater urgency.⁷⁴

In Part II, I examine the legal constraints on biography: the fact/expression dichotomy and fair use doctrine of copyright law, and privacy theories that inform copyright decisions. With respect to each area, I first offer an overview of the legal doctrine. Second, I argue that each area of the law rests on certain implicit assumptions about society; and third, I question the validity of these assumptions.⁷⁵ Fourth, I describe how the pervasiveness of these assumptions in the law governs how biographers research, write, and envision biography. In Section III, I suggest a normative vision of biography that should be protected and encouraged by law and society. I argue that because this "normative" biography avoids an acceptance of the societal assumptions underlying current legal doctrines and encourages reader and biographer to participate in a critical approach to interpretation, it can contribute to greater social understanding, thereby offering the possibility of change in law and community life.⁷⁶ Current legal doctrines, however, foreclose the possibility of normative biography. In Section IV, I critique the preliminary fair use solutions suggested by legal commentary and congressional action and sketch a different analysis, not involving fair use, that might foster normative biography and nurture a culture of questioning.

Hampton, N.Y. Times, Oct. 29, 1989, § 7 (Book Review), at 3, cols. 1 & 3 (reviewer of RALPH DAVID ABERNATHY, *AND THE WALLS CAME TUMBLING DOWN: AN AUTOBIOGRAPHY* (1989), criticizing Abernathy for commenting on Dr. Martin Luther King, Jr.'s sexual activities); oral history, see JOHN N. NEUENSCHWANDER, *ORAL HISTORY AND THE LAW* (1985); and access to other historical documents, see, e.g., N.Y. Times, Nov. 21, 1989, at C1, C8, cols. 2-6 (discussing accusation that restricted access to the Dead Sea Scrolls is blocking new historical interpretation); N.Y. Times, Feb. 9, 1990, at A18, col. 1; N.Y. Times, Oct. 25, 1989, at A1, col. 6 (discussing district court holding that National Security Adviser John Poindexter was entitled to former President Ronald Reagan's personal papers and diaries because they were material to his defense).

73. See James T. Kloppenberg, *Objectivity and Historicism: A Century of American Historical Writing* (Book Review), 94 AM. HIST. REV. 1011, 1014 (1989).

74. See, e.g., UMBERTO ECO, *FOUCAULT'S PENDULUM* 56-57 (1989) (describing the search of a dead man's computer diary). The analysis should apply to writing stored on computers, for "the moment you pick up the clay, electronic or otherwise, you become a demiurge . . ." *Id.* at 57; see also N.Y. Times, July 7, 1990, at A1, col. 1 (discussing the "paperless office").

In addition, libraries are beginning to collect computer disks. Interview with Harry Martin, Professor and Librarian, Langdell Library, Harvard Law School, in Cambridge, Mass. (Feb. 9, 1990).

75. Cf. Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 48 (1988) (discussing "the adoption of unstated reference points that hide from view a preferred position and shield it from challenge by other plausible alternatives").

76. Cf. Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 101-02 (1984) ("It will . . . help us to relativize our understanding of the past's relation to the present if we see that our conventional views of that relation are mediated by familiar story-lines . . . [and that] there always exist—and so we always may draw upon—competing stories that impress the same historical experience with radically different meanings.").

II. THE LAW OF BIOGRAPHY

The principal legal constraints on biography involve copyright and privacy. Although the copyright statute does not explicitly mention privacy, privacy concerns often inform copyright decisions. Some judicial opinions and commentators suggest that the doctrines may be inseparable.⁷⁷ For analytical ease, I discuss copyright and privacy separately; however, for the foregoing reasons, strict adherence to this division is impossible.

A. Copyright

Cases involving biographers' use of unpublished materials raise specific copyright issues. Under the 1976 federal copyright act,⁷⁸ a court must first determine whether someone, usually the plaintiff, owns a copyright in the unpublished materials or whether the materials are in the public domain.⁷⁹ "Facts," perceived as generally accepted or arguably verifiable information, cannot be copyrighted; in contrast, expression, understood as a particular individual's choice of words, can be copyrighted.⁸⁰ If the material is subject to copyright, the court must then decide whether the biographer has a fair use defense, permitting use of the otherwise protected material.⁸¹ Under recent cases, unpublished expression receives broad protection: it is subject at

77. See Jon O. Newman, *Copyright Law and the Protection of Privacy*, 12 COLUM.-VLA J.L. & ARTS 459, 477 (1988) ("Copyright law seeks to promote the useful arts. This task requires some zone of privacy in which each of us may not only formulate our thoughts but also commit them to paper."); Dana, *supra* note 58, at 351 (discussing "the ill-defined interface" of the two areas). Commentators have suggested that the Second Circuit's *Salinger* decision promotes privacy concerns within the rubric of copyright doctrine. See Peppe, *supra* note 45.

78. The Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (1976) (current version at 17 U.S.C. §§ 101-914 (1988)). The 1976 Act replaced the 1909 Act. Act of March 4, 1909, Pub. L. No. 349, ch. 320, 35 Stat. 1075 (1909). Under the 1909 statute, only published materials received statutory copyright protection. Unpublished materials were protected by common law copyright, which granted perpetual protection. See HORACE G. BALL, *THE LAW OF COPYRIGHT AND LITERARY PROPERTY* 47-48, 57, 470-74 (1944). The 1976 statute abolished this dual system, granting federal copyright protection at the moment the work is fixed in a tangible medium of expression, regardless of publication. 17 U.S.C. §§ 101-102 (1988).

I will not discuss the effect of adherence by the United States to the Berne Convention, see Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, 102 Stat. 2853 (1988) (amending title 17 to bring United States copyright law into adherence with internationally recognized standards for the protection of works of authorship of all kinds), on the issue of the use of unpublished expression. Statements offered at the congressional hearings persuasively argue that the Convention's language can be interpreted to permit a variety of uses of material short of complete freedom to copy. See *Hearings*, *supra* note 6, at 18-28 (statement of Floyd Abrams); *id.* at 51-60 (statement of Ralph Oman).

79. Despite discarding the perpetual protection given unpublished materials under common law copyright, the 1976 statute prohibits any materials from falling into the public domain before December 31, 2002. 17 U.S.C. § 303 (1988). Hence, on January 1, 2003, if an author has been dead for fifty years, all of her or his unpublished materials will lose copyright protection without regard to her or his intent. After 2002, however, many unpublished materials will remain in the possession of private individuals—not actually in the public domain. Under current law, privacy actions based on state statutes or common law will become the only potential legal action to bar public disclosure of materials not in private possession. I discuss privacy at notes 193-250 *infra* and accompanying text.

80. See notes 86-133 *infra* and accompanying text (discussing the fact/expression dichotomy).

81. See 17 U.S.C. § 107 (1988); note 36 *supra*.

the most to only a narrow fair use privilege.⁸² If the court finds infringement, the offending material can be enjoined and damages levied.⁸³ The possibility of a first amendment defense seems doubtful under current case law.⁸⁴ In addition to claiming copyright infringement, a plaintiff may claim violations of a right to privacy under state law, although she or he will not likely succeed.⁸⁵

1. *The fact/expression dichotomy.*

The legal background. Copyright law permits the unfettered use of "facts" taken from other works while restricting republication of another's "expression."⁸⁶ Although the fact/expression dichotomy has been widely

82. See notes 134-151 *infra* and accompanying text.

83. 17 U.S.C. §§ 501-505 (1988). Damages usually will be small. Statutory damages, even if the violation is willful, cannot exceed \$100,000. § 504(c)(2). Actual damages can include profits only if the profits are attributable to the infringement. § 504(b). Injunctions, *see* § 502, often more attractive to the plaintiff, raise the problem of prior restraint and appear to transgress first amendment principles. *See New Era Publications, Int'l v. Henry Holt & Co.*, 873 F.2d 576, 596-98 (2d Cir. 1989) (Oakes, J., concurring); *New Era*, 695 F. Supp. at 1525-28; *see also* Gordon, *supra* note 66, at 1372 & n.139 (noting that courts have either issued an injunction and awarded damages, or granted the plaintiff no relief). Furthermore, lawsuits cost both sides. The plaintiff's privacy and copyright concerns may be jeopardized by the publication of even a few controversial passages in the judicial opinion. Or, the defendant may voluntarily censor the controversial material, or be censored by the publisher, to avoid the cost of trial. This result is particularly true for academic books, as the additional profits from publication with, as opposed to without, the material rarely justify the time and expense of a prolonged legal battle.

84. *See Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 555-60 (1985) (stating that copyright laws are not restrictions on freedom of speech because copyright protects only the form of expression and not the ideas expressed).

85. *See, e.g., New Era*, 695 F. Supp. at 1505 (stating that a privacy claim would have failed "on many grounds"). State privacy actions are not preempted by the copyright statute, *see id.* (citing authorities); however, they usually fail. First, privacy interests generally terminate at death. *See id.*; Lawrence Edward Savell, *Right of Privacy—Appropriation of a Person's Name, Portrait or Picture for Advertising or Trade Purposes without Prior Written Consent: History and Scope in New York*, 48 ALB. L. REV. 1, 37-38 (1983); *see also* Ernest Partridge, *Posthumous Interests and Posthumous Respect*, 91 ETHICS 243 (1981) (discussing philosophical rationales for respecting the interests of the dead). Second, the public interest may trump privacy rights. *See New Era*, 695 F. Supp. at 1505; Savell, *supra*, at 17 & n.73. Third, the state may refuse to recognize a common law privacy action. *See Savell, supra*, at 2. Finally, statutory actions may be insufficient. They may not cover uses of words or may require that an invasion be unreasonable and highly offensive. *See Savell, supra*, at 2-3 & n.4; *see also* Dana, *supra* note 58, at 394-408 (describing the limitations on privacy actions); Peppe, *supra* note 45, at 433 n.95, 459, 464. For an interesting, anecdotal account of a successful privacy action by a living subject against an author, *see* PATRICIA NASSIF ACTON, *INVASION OF PRIVACY: THE CROSS CREEK TRIAL OF MARJORIE KINNAN RAWLINGS* (1988).

86. *See, e.g., Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987) ("The biographer who copies only facts incurs no risk of injunction; he has not taken copyrighted material. And it is unlikely that the biographer will distort those facts by rendering them in words of his own choosing.").

Numerous articles discuss the "fact/expression dichotomy" as applied to various works. *See, e.g.,* Robert C. Denicola, *Copyright in Collections of Facts: A Theory for the Protection of Nonfiction Literary Works*, 81 COLUM. L. REV. 516 (1981) (as applied to nonfiction narratives and compilations); Gary L. Francione, *Facing The Nation: The Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. PA. L. REV. 519 (1986) (as applied to the "totality" approach, whereby noncopyrightable facts secure some measure of protection when combined with copyrightable expression); Robert A. Gorman, *Copyright Protection for the Collection and Representation of Facts*, 76 HARV. L. REV. 1569 (1963) (as applied to the use of facts); Robert A. Gorman, *Fact or Fancy? The Implication for Copyright*, 29 J. COPYRIGHT SOC'Y 560 (1982) (as applied to "fact

accepted as the preliminary issue that a court should raise when it determines copyrightability,⁸⁷ the dichotomy does not appear in the Copyright Act of 1976.⁸⁸ Instead, the dichotomy arises from the copyright clause of the Constitution and its "originality" requirement.⁸⁹ The purpose of the clause, as well as the manner in which it effectuates its purpose, is the source of continuous debate.⁹⁰ Nevertheless, the broad intent of the clause appears to be the advancement of human knowledge through the original efforts of

works," works that "communicate information about our society and the world about us," e.g., maps, directories, biography, contrasted with works of imagination or fancy, e.g., music, sculpture, and dance); William F. Patry, *Copyright in Collections of Facts: A Reply*, COMM. & L., Oct. 1984, at 11 (as applied to nonfiction narratives); Christopher Hill, *Copyright Protection for Historical Research: A Defense of the Minority View*, 31 COPYRIGHT L. SYMP. (ASCAP) 45 (1984) (student author) (as applied to the factual elements of historical work that are the product of original research); Jee Hi Park, *The Chilling Effect of Overprotecting Factual Narrative Works*, 11 HASTINGS COMM/ENT L.J. 75, 88 (1988) (student author) (as applied to "an unspoken exception to the copyrightability standard . . . that increases protection for works of highly regarded authors"); Edward K. Sato, *Copyright Law & Factual Works: Is Research Protected?*—*Miller v. Universal City Studios, Inc.*, 58 WASH. L. REV. 619 (1983) (student author) (as applied to copyright protection in factual matters); Elizabeth M. Saunders, *Copyright Protection for Compilations of Fact: Does the Originality Standard Allow Protection on the Basis of Industrious Collection?*, 62 NOTRE DAME L. REV. 763 (1987) (student author) (as applied to copyright protection of "intellectual labor" rather than mere mechanical labor); John A. Taylor, *The Uncopyrightability of Historical Matter: Protecting Form over Substance & Fiction Over Fact*, 30 COPYRIGHT L. SYMP. (ASCAP) 33 (1983) (student author) (as applied to historical and biographical matter). One author discusses the nature of fact and expression, see Jane C. Ginsburg, *Sabotaging and Reconstructing History: A Comment on the Scope of Copyright Protection in Works of History After Hoehling v. Universal City Studios*, 29 J. COPYRIGHT SOC'Y 647 (1982); however, her analysis does not question the dichotomy's assumption that "facts" can be determined.

87. See, e.g., *Harper & Row*, 471 U.S. at 556 ("No author may copyright . . . the facts he narrates."); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 974 (2d Cir.), cert. denied, 449 U.S. 841 (1980); H. BALL, *supra* note 78, at 240; 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2.11[A], at 2-157 to -158 (citing cases) [hereinafter NIMMER ON COPYRIGHT]; COMPENDIUM OF COPYRIGHT OFFICE PRACTICES § 202.02(d) (1984) (staff manual) ("[a] fact or event, as distinguished from the manner in which it is described in a particular work, is not copyrightable"); *id.* § 318 (discussing "Facts, historical data, and 'news'"). The fact/expression dichotomy applies to published and unpublished works. See Newman, *supra* note 57, at 14 ("No decision of our Court casts even the slightest doubt upon the fundamental principle that *factual content* may be copied, even though the facts are unearthed in unpublished writings.").

88. The statute states only that "in no case does copyright protection for an original work of authorship extend to any idea, procedure, . . . concept, principle, or discovery." 17 U.S.C. § 102(b) (1988). One leading treatise suggests that the "fact" limit on copyright is codified in the statutory refusal to extend copyright protection to "discovery." See 1 NIMMER ON COPYRIGHT, *supra* note 87, § 2.11[A], at 2-159. Although courts have noted the relation between "facts" and "expression," they do not appear to have adopted the argument that the fact/expression dichotomy has been codified by the statute's use of "discovery." See, e.g., *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1368-69 (5th Cir. 1981) (quoting NIMMER ON COPYRIGHT on fact and discovery, but omitting any suggestion that "discovery" in the Act codifies the dichotomy).

89. "The Congress shall have Power . . . To promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." U.S. Const. art. I, § 8, cl. 8. The originality requirement derives from the use of the term "Authors." Authors can only obtain protection for writings that originated from them. "Facts may be discovered, but they are not created by an act of authorship." 1 NIMMER ON COPYRIGHT, *supra* note 87, § 2.11[A], at 2-157.

90. Scholars have haggled over a variety of possible purposes of the copyright monopoly. Compare Gordon, *supra* note 66, at 1348-50 (discussing economic incentive purpose) with Fisher, *supra* note 44, at 1744-94 (suggesting that the purpose should be "to advance a just and attractive intellectual culture").

authors. Copyright's encouragement of creative endeavors and its promotion of human knowledge imply that some information—"facts"—cannot be subject to copyright's monopoly. As one court stated, "the cause of knowledge is best served when history is the common property of all."⁹¹

Standing alone, the interpretation of the copyright clause as requiring free access to facts might have been challenged by economic and property justifications often advanced in support of granting copyright monopolies. But the belief that "facts" cannot be monopolized draws strength from a parallel idea inherent in the first amendment. As Judge Miner observed, "the freedom of access to facts and ideas is the history of democracy";⁹² such freedom has promoted theories about freedom of speech, the marketplace of ideas, and invigorated democratic dialogue.⁹³ Although the relation between "expression" in copyright law and in the first amendment remains unclear,⁹⁴ both doctrines accept that some information must remain freely accessible and usable by all.

Neither courts nor commentators draw a clear line between what constitutes "fact" and what constitutes "expression."⁹⁵ The obscurity becomes a problem in an infringement case when a court confronts two sets of words: first, the copyrighted work of the plaintiff, and second, the allegedly infringing work of the defendant. Courts have indicated that the second set does not infringe the first one only if the second uses solely those aspects of the first which constitute "facts." The second set's use of "expression" from the first set, even when paraphrased, infringes the first.⁹⁶ Courts have not devel-

91. *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980); *see also Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 556 (1985).

92. *Miner*, *supra* note 57, at 10.

93. *See* LAURENCE H. TRIBE, CONSTITUTIONAL LAW § 12-1 (2d ed. 1988) (discussing breadth of "free expression"); *id.* § 12-4 (discussing academic freedom); *id.* § 12-19 (discussing "right to know"); *id.* §§ 15-6 & 15-7 (discussing the shaping of societal beliefs: "[t]he guarantee of free expression is inextricably linked to the protection and preservation of open and unfettered mental activity").

94. Some commentators argue that the existence of the fact/expression and the idea/expression dichotomies, and the fair use defense, prevent copyright law from violating the first amendment. According to the theory, the first amendment only protects facts and ideas, but does not protect the use of another's expression. *See, e.g., Harper & Row*, 471 U.S. at 556-60; *New Era Publications, Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989) ("An author's expression of an idea . . . is not considered subject to the public's 'right to know.'"); James L. Swanson, *Copyright versus the First Amendment: Forecasting an End to the Storm*, in 1988 ENTERTAINMENT, PUBLISHING AND THE ARTS HANDBOOK 3 (J.D. Viera & R. Thorne eds.) (arguing that a free speech privilege in copyright will harm copyright by weakening its private property basis and will trivialize the first amendment). Others contend that copyright doctrines do not suffice; they advocate first amendment claims in copyright actions. *See, e.g., Gordon*, *supra* note 66, at 1352 ("it is my belief that the public interest in free speech should indeed 'trump' conflicting intellectual property rights in appropriate cases"), 1377, 1383 n.189, 1403 n.268; Alfred C. Yen, *A First Amendment Perspective on the Idea/Expression Dichotomy and Copyright in a Work's "Total Concept and Feel"*, 38 EMORY L.J. 393, 435 (1989) (stating that "copyright law has clearly begun to exceed its constitutional boundaries").

95. Expression has been defined as "the author's analysis or interpretation of events, the way he or she structures material and marshals facts, the author's choice of words, and the emphasis the author gives to particular developments." *Werlin v. Reader's Digest Ass'n*, 528 F. Supp. 451, 461-62 (S.D.N.Y. 1981) (citing *Wainwright Securities, Inc. v. Wall St. Transcript Corp.*, 558 F.2d 91 (2d Cir. 1977)).

96. *See Salinger v. Random House, Inc.*, 650 F. Supp. 413, 419 (S.D.N.Y. 1986), *rev'd*, 811

oped a coherent doctrine, but instead rely on intuition to distinguish "fact" from "expression." Some courts have stated that "fact" encompasses all "historical information."⁹⁷ Others have suggested that "fact" should be more narrowly defined.⁹⁸ The Supreme Court explicitly has refused to address this debate.⁹⁹ It has acknowledged, however, that in certain circumstances "expression" may be necessary to convey "fact."¹⁰⁰ Courts have not even consistently adopted a viewpoint—be it the author's, the judge's, or the public's—from which to determine whether material is "fact" or "expression."¹⁰¹ Despite an absence of doctrinal guidance, courts continue to sift uncopyrightable "fact" from copyrightable "expression."

The legal assumption. Underlying this separation of "fact" and "expression" rests an acceptance of objectivity, a concept that encompasses, as historian Peter Novick observes,

a commitment to the reality of the past, and to truth as correspondence to

F.2d 90, 97 (2d Cir. 1987). Because the fact/expression problem is difficult to conceptualize, I offer a hypothetical. At age 87, Groucho Marx stated, "I'm as young as the day is long, and this has been a very short day. Nothing lasts forever." Charlotte Chandler, *Julius Henry Marx, at 100*, N.Y. Times, Oct. 6, 1990, § 1, at 23, col. 2. Consider yourself a biographer. You discover that Groucho wrote the line down but never published it. According to courts, the quote is expression; it is therefore copyrighted. Assume that you cannot persuade the copyright holders to give you permission to use this expression. You believe, however, that the quote reveals Groucho's characteristic style of humor, his power to communicate a perception in a short phrase, and his unfaltering optimism in the last days of his life. Because you cannot quote Groucho, you struggle to capture the essence of his words. But prose such as "At 87, Groucho wrote that his life had passed quickly," or "Groucho compared his life to a rapidly passing day," does not demonstrate to the reader the humor, intelligence, and courage of the original quote. The attempt to state a "fact" underlying the quotation ignores and fails to convey the quotation's original ability to serve as a "fact" to instruct the reader and advance your thesis about Groucho.

97. *Craft v. Kobler*, 667 F. Supp. 120, 122 (S.D.N.Y. 1987); see also *Hoehling v. Universal Studios, Inc.*, 618 F.2d 972, 974 (2d Cir. 1980) (stating that "the protection afforded the copyright holder has never extended to history").

98. See *Wainwright*, 558 F.2d at 95-96 (stating that "the essence of infringement lies not in taking a general theme or in coverage of the reports as events, but in appropriating the 'particular expression through similarities of treatment, details, scenes, events and characterization'" (quoting *Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976))).

99. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 548 (1985).

100. See *id.* at 563 (suggesting that use of Ford's expression, the "smoking gun," to refer to the White House tapes could not be copyrightable); see also *New Era Publications, Int'l v. Henry Holt & Co.*, 873 F.2d 576, 591-92 (2d Cir. 1989) (Oakes, J., concurring) ("The law recognizes that words themselves may be facts to be proven."). Current doctrine, however, recognizes entire quotations as facts in an extremely narrow set of circumstances.

Melville Nimmer first suggested an analogous concept in distinguishing "idea" from expression. If the idea were "wedded" to the expression such that the idea could not be communicated except by using the particular expression, as in, for example, the photos taken at My Lai, the expression would not be protected. Nimmer only addressed graphic representations. See 1 NIMMER ON COPYRIGHT, *supra* note 87, § 1.10[C].

Judge Newman has suggested a similar understanding for certain uses of expression. His proposal would extend the scope of material subject to the fair use exception. He argues that "quotation of expressive content for the purpose of fairly and accurately conveying factual information" falls under the "purpose and character" inquiry in fair use doctrine. Newman, *supra* note 57, at 15; see *New Era*, 884 F.2d at 662-63 (Newman, J., dissenting).

101. See, e.g., *Olivier v. St. Germain Found.*, 41 F. Supp. 296 (S.D. Cal. 1941) (holding that a book based on a "factual" experience of spiritual communication with Phyllos, the Thibetan, was in the public domain, despite disavowing any belief in the existence of the spiritual world). In reaching its decision, the court ignored its own viewpoint and assumed the author's.

that reality; a sharp separation between knower and known, between fact and value, and, above all, between history and fiction. Historical facts are seen as prior to and independent of interpretation . . . Truth is one, not perspectival. Whatever patterns exist in history are "found," not "made."¹⁰²

The fact/expression dichotomy embraces objectivity. Having decided that some knowledge must remain outside of copyright,¹⁰³ the doctrine dubs this realm "fact," comprised of information existing "prior to and independent of interpretation." Copyright protects only the creative additions of the author, which the doctrine entitles "expression." Thus, judges must sort fact from expression. But their judgment that a series of words constitutes an uncopyrightable "fact" does not involve an inquiry into how the author uses the material—for example, to establish a claim that something was true or happened. Courts rarely engage in deeper analysis, or ask tough questions such as "Why should we call these words 'facts'?" or "How do we know that these words are 'expression'?" Their decisions typically rest upon an "everyone knows it when they see it" intuition that certain series of words are "facts" while others are not.¹⁰⁴ And even if most would agree that the statement, "On October 1, 1990, George Bush was president of the United States" is a "fact," the sets of words confronting judges—particularly those that arise in the complex context of primary source research and analysis—are less susceptible to easy categorization. But judges do not alter or reconsider traditional fact/expression analysis.¹⁰⁵ Envisioning a historical world

102. PETER NOVICK, *THAT NOBLE DREAM: THE "OBJECTIVITY QUESTION" AND THE AMERICAN HISTORICAL PROFESSION* 1-2 (1988).

103. See notes 86-91 *supra* and accompanying text.

104. Other areas of the law also rely on a judicial ability to label certain things "fact"—for example, appellate courts' review of administrative decisions. See 5 KENNETH CULP DAVIS, *ADMINISTRATIVE LAW TREATISE* § 29:9, at 368 (2d ed. 1984) (discussing the law-fact distinction in review of administrative action, noting "a delightful observation as early as 1922 can be appreciated: 'whether a particular question is to be treated as a question of law or a question of fact is not in itself a question of fact, but a highly artificial question of law'" (citing Nathan Isaacs, *The Law and the Facts*, 22 COLUM. L. REV. 1, 11-12 (1922))). Moreover, legal history teaches us to be wary of reliance on intuition and common sense. "Common sense" visions of the world often have proven to be solely the vision of a particular group. For example, the law accepted that women or persons of color did not possess the same rights as many white men, or valorized as "facts" particular notions of justice. See *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 407 (1857) (describing early American "public opinion": "They [African Americans] had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race . . . and so far inferior, that they had no rights which the white man was bound to respect."). See generally CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982).

105. In *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), Judge Leval employed a rather unusual approach to the fact/expression dichotomy. He first found that "virtually every passage taken by Hamilton from the 59 letters consist[ed] primarily of a report of such historical fact (or of an idea) which is not protected by the copyright." *Id.* at 418. He believed, however, that whatever "fact" existed, it could be separated from the "expression," and so he proceeded with the fair use analysis.

The consequences of such a method can be seen in the "pedestrian" issue in *Salinger*. At trial, Hamilton initially responded to a question, on cross examination, about his use of a quotation by stating that he "wanted to convey the fact that [Salinger] was adopting an ironic tone . . ." *Salinger v. Random House, Inc.*, 811 F.2d 90, 96 (2d Cir. 1987). The court ignored Hamilton's proposition that use of the expression was the fact; instead, it focused on Hamilton's responses that without

in which "facts" actually do occur, the doctrine assumes that one can distinguish "expression" from independent, objective "fact."

Questioning the validity of the assumption. The assumption that one can distinguish "expression" from objective "fact" has been debated extensively. The following discussion briefly addresses a few representative critiques of the objectivity assumption, particularly those of legal commentators, historians, and others who have questioned our ability to distinguish "fact" from "expression." Legal academics have suggested that the attempt to establish unambiguous, definable "fact" may be pointless activity bound to fail.¹⁰⁶ Some observe that "truth" and "fact" exist only with respect to certain perspectives; all statements and assertions are not objective, but "perspectival," implying desired ends and considered beginnings.¹⁰⁷ Even those theorists who believe that some vision of truth might exist quarrel with simplistic attempts by courts to determine it.¹⁰⁸

Historians have discussed the limitations of objectivity more extensively, and consequently, have altered their perception of the historical profession. Carl L. Becker, addressing the American Historical Association in 1932, observed:

the quotation, the sentence would be "pedestrian." *Id.* Judge Newman concluded that "when dealing with copyrighted expression, a biographer . . . may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a 'pedestrian' sentence." *Id.* at 96-97. Judge Newman failed to consider whether "reporting the fact" required using the expression. After the trial, Hamilton's argument that he should be free to quote the words as fact returned to haunt him. A reviewer argued that Hamilton had mischaracterized Salinger's letters. *See New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1503 n.5 (S.D.N.Y. 1988) (quoting Mordechai Richler, *N.Y. Times*, June 5, 1988, § 7 (Book Review), at 7).

In *New Era*, Judge Leval did not even waste space with fact/expression analysis. Assuming the quotations were expression, he began with fair use. 695 F. Supp. at 1499.

106. *See, e.g.*, BERNARD S. JACKSON, *LAW AND NARRATIVE COHERENCE* (1988) (arguing that "facts" are constructed; therefore, judicial decisionmakers should focus on the narrative coherence and integrity of the speaker); Charles Nesson, *The Evidence or the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1368-69 (1985) (arguing that many evidentiary rules and other aspects of the trial process are better explained by a need to promote public acceptance of verdicts than by a desire to search for truth); Kim Lane Scheppele, *Foreword: Telling Stories*, 87 MICH. L. REV. 2073, 2086 (1989) (illustrating the difficulty in determining "fact" in a rape case, where judges described the same physical movements of the defendant, who placed his hands on a woman's neck, as "heavy caressing" and "light choking").

107. *See* CATHARINE A. MACKINNON, *Not a Moral Issue*, in *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 146, 155 (1987) ("But in a society of gender inequality, the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness under that despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare."); Scheppele, *supra* note 106, at 2082 ("stories may diverge . . . not because one is true and another false, but rather because they are both self-believed descriptions coming from different points of view informed by different background assumptions about how to make sense of events"); *cf.* Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 13-14 (1989) ("it is the most vulnerable, the most forgotten, whose perspective is least akin to that of the lawmaker or judge or bureaucrat and whose fate is most forcefully determined by the law's overall design—by its least visible, most deeply embedded gaps and deflections").

108. *Cf.* RONALD DWORKIN, *LAW'S EMPIRE* 413 (1986) (suggesting a theory of judicial decisionmaking viewing law as integrity—"an interpretive, self-reflective attitude addressed to politics in the grandest sense"); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (suggesting a need for "reflective equilibrium through which proposed conceptions are weighed to effectuate continued revision in personal judgments").

Left to themselves, the facts do not speak; left to themselves they do not exist, not really, since for all practical purposes there is not fact until some one affirms it. . . . However "hard" or "cold" they may be, historical facts are after all not material substances which, like bricks or scantlings, possess definite shape and clear, persistent outline. . . . A brick retains its form and pressure wherever placed; but the form and substance of historical facts, having a negotiable existence only in literary discourse, vary with the words employed to convey them. Since history is not part of the external material world, but an imaginative reconstruction of vanished events, its form and substance are inseparable: in the realm of literary discourse substance, being an idea, *is* form; and form, conveying the idea, *is* substance.¹⁰⁹

The argument has been debated and redebated by historians for over a hundred years, waxing and waning in popularity.¹¹⁰ Peter Novick argues that social, political, cultural, and professional contexts explain the acceptance and rejection of objectivity by historians in the United States. Immediately prior to the 1960s, the objectivity assumption created little controversy. During the 1960s, however, "the notion of a determinate and unitary truth about the physical and social world, approachable if not ultimately reachable, came to be seen by a growing number of scholars as a chimera."¹¹¹ Most historians did not abandon altogether the idea of doing history; rather, they began to reexamine the nature of the historical enterprise.¹¹² The growing recognition that historical judgment is ubiquitous, as one historian observed, seems to "doom the simple-minded objectivist myth."¹¹³ Instead of objectivity, historians may adopt the only assumption possible: "that the contest of interpretations, the play of meanings, must not be closed, that the conversation of humankind must be kept open."¹¹⁴ If the assumption of objectivity is at least momentarily neglected and the historical enterprise reconstructed, historians will succeed in a challenge that the legal doctrine has refused to address.¹¹⁵

109. Carl L. Becker, *Everyman His Own Historian*, 37 AM. HIST. REV. 221, 233-34 (1932). Becker was criticized by his colleagues for his address. P. NOVICK, *supra* note 102, at 250-78. Sidney Terr, a historian at Ohio State University, told Becker that the address "'caused no end of confusion among the . . . scientifically minded in the department.'" P. NOVICK, *supra* note 102, at 259 (quoting Letter from Terr to Becker (Dec. 18, 1933)). Others were pleased that Becker "killed the notion that facts have any meaning in themselves, apart from that shed upon them by our own mind." *Id.* (quoting Letter from Preserved Smith to Becker (Feb. 2, 1932)).

110. See generally P. NOVICK, *supra* note 102.

111. *Id.* at 523.

112. See, e.g., David Harlan, *Intellectual History and the Return of Literature*, 94 AM. HIST. REV. 581, 596 (1989); David A. Hollinger, *The Return of the Prodigal: The Persistence of Historical Knowing*, 94 AM. HIST. REV. 610 (1989).

113. Kloppenberg, *supra* note 73, at 1026.

114. John E. Toews, *Intellectual History after the Linguistic Turn: The Autonomy of Meaning and the Irreducibility of Experience*, 92 AM. HIST. REV. 879, 904 (1987) (summarizing Richard Rorty's suggestion); cf. Kloppenberg, *supra* note 73, at 1028, 1030:

Beyond the noble dream of scientific objectivity and the nightmare of complete relativism lies the terrain of pragmatic truth, which provides us with hypotheses, provisional syntheses, imaginative but warranted interpretations, which then provide the basis for continuing inquiry and experimentation. Such historical writing can provide knowledge that is useful even if it must be tentative.

115. Cf. Kloppenberg, *supra* note 73, at 1030 ("historical truth—like all truth in a world that

Such a refusal cannot be the consequence of inadequate warning. Historians have long criticized the very fact/expression dichotomy that the law accepts. One historian writes: "The way in which men evaluate reality is historically part of that reality. It is itself a fact. So there is not any question of a dichotomy between subjective interpretation and objective fact: for, as in any scientific law, the interpretation is part of the fact."¹¹⁶ Others echo the understanding that whatever "facts" may be, they cannot be easily sliced away from the way in which they are expressed.¹¹⁷

Despite the academic criticism, and the example historians set by writing history even after forsaking the objectivity assumption, the fact/expression dichotomy persists. Judges passively accept a world of objective, unchanging "facts" and "truths" without perceiving, at least explicitly, the epistemological consequences.¹¹⁸ They have not recognized the fact/expression

has moved beyond the discredited dualisms of both positivism and idealism—must be made, questioned, and reinterpreted").

116. Gordon Leff, *The Past and the New*, in *THE VITAL PAST: WRITINGS ON THE USES OF HISTORY* 58, 62 (S. Vaughn ed. 1985) [hereinafter *THE VITAL PAST*].

117. See Lionel Gossman, *History and Literature: Reproduction or Signification*, in *THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING* 3, 29 (R. Canary & H. Kozicki eds. 1978) (recognizing that "history constructs its objects, and that its objects are objects of language, rather than entities of which the words are in some way copies"); Gerda Lerner, *The Necessity of History and the Professional Historian*, in *THE VITAL PAST*, *supra* note 116, at 104, 107 ("Making history means form-giving and meaning-giving. There is no way to extricate the form-giving aspect of history from what we are pleased to call the facts."); Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in *LOUIS O. MINK: HISTORICAL UNDERSTANDING* 182, 201 (B. Fay, E. Golob & R. Vann eds. 1987):

"Events" (or more precisely, descriptions of events) are not the raw materials out of which narratives are constructed; rather an event is an abstraction from a narrative. An event may take five seconds or five months, but in either case whether it is one event or many depends not on a definition of "event" but on a particular narrative construction which generates the event's appropriate description.

See also DAVID BOUCHER, *TEXTS IN CONTEXT: REVISIONIST METHODS FOR STUDYING THE HISTORY OF IDEAS* (1985); Leon Pompa, *Truth and Fact in History*, in *SUBSTANCE AND FORM IN HISTORY: A COLLECTION OF ESSAYS IN PHILOSOPHY OF HISTORY* 171 (L. Pompa & W. Dray eds. 1981).

118. Judicial adherence to the fact/expression dichotomy has led to unusual analyses even outside the arena of unpublished materials. For example, in *Miller v. Universal City Studios*, 650 F.2d 1365 (5th Cir. 1981), the court considered a jury instruction that research is copyrightable. The plaintiff, a Miami Herald reporter, had collaborated with the victim of a bizarre kidnapping incident on a book about the crime. *Id.* at 1367. The defendant, Universal City Studios, had written, produced, and aired a television movie about the incident. The jury found that the movie infringed Miller's copyright in the book. *Id.* The appellate judge concluded that the trial judge erred in instructing the jury that research is copyrightable.

The valuable distinction in copyright law between facts and the expression of facts cannot be maintained if research is held to be copyrightable. There is no rational basis for distinguishing between facts and the research involved in obtaining facts. To hold that research is copyrightable is no more or no less to hold that the facts discovered as a result of research are entitled to copyright protection.

Id. at 1372. Regardless of one's belief in the protection that should be accorded original researchers, the judge's use of the fact/expression dichotomy permitted an escape from an exploration of what "research" is. The judge perceived "research" as fact; it could not mean, as was argued to the court, "the original expression by the author of the results of the research." *Id.* at 1369. Hence, assuming that facts exist, and that the plaintiff's research merely represented a process of gathering these facts, the judge could not perceive any other argument permitting some sort of protection for the plaintiff's book.

dichotomy's underlying assumption of objectivity. They have not questioned what many argue stands as an archaic remnant of a more assured time and a passive acceptance of "common sense" intuition.

Effect on biography. As expounded by the courts, the fact/expression dichotomy severely restricts biographers. Recent cases reveal that courts, in general, presume that the unpublished writings of an author are "expression" and thus protected by copyright. Absent fair use, a biographer infringes whenever she or he quotes or too closely paraphrases such expression. To tell their stories, then, biographers may use only that something else, that "fact" underlying the "expression."

Although biographers understand the fair use doctrine, their awareness of the fact/expression dichotomy is less widespread. Biographers may not even realize that the entire fair use analysis follows a determination that the information used was "expression" and not "fact." Their daily research, however, demonstrates that the notion of fact often gives way to a morass of conflicting interpretation. Despite this knowledge, they do not believe that the idea of "fact" has no value.¹¹⁹ Nevertheless, biographers are all too aware that establishing "fact" is extremely difficult.¹²⁰ As Leon Edel noted, in biography, facts "are always soft as flesh, and as yielding."¹²¹

Biographers read diary entries and letters, searching for an understanding of their subjects. But the diary entry or letter bears an ambiguous relation to the "life" that it describes,¹²² for biographical research abounds with deceiving historical texts.¹²³ Richard Ellmann describes biographical investigation: "where everything can stand for its opposite, where fantasies and facts intertwine, we look desperately for a position in time and space. Freud is supposed to have said that there are times when a cigar is just a cigar. But

119. See W. EPSTEIN, *supra* note 4, at 48-50 (demonstrating that even believers in "objective" biography are aware of the problems of fact); IRA BRUCE NADEL, *BIOGRAPHY: FICTION, FACT AND FORM* 4-11 (1984). For a comparison of views on facts, see D. NOVARR, *supra* note 11.

120. I spoke to a number of biographers, none of whom believed that the "fact" underlying a quotation could be separated easily from the quoted "expression." E.g., Interview with John Milton Cooper, *supra* note 67; Telephone interview with Thomas C. Reeves, Professor, Department of History, University of Wisconsin-Parkside (Aug. 11, 1989); Interview with Linda Simon, *supra* note 67.

121. L. EDEL, *supra* note 10, at 214.

122. See OSCAR HANDLIN, *TRUTH IN HISTORY* 165-93 (1979) (noting that language generally does not accurately reflect reality, e.g., "laissez-faire" did not originally mean "economic freedom"); *THE HISTORIAN AS DETECTIVE: ESSAYS ON EVIDENCE* (R. Winks ed. 1969) (compiling 26 essays from writers as diverse as Carl L. Becker and Russell Baker on historians' inexact and inferential search for "evidence"); M. LOMASK, *supra* note 14, at 32 (noting that "[p]ure facts . . . are few and far between . . . [M]uch of biography consists not of facts but of probabilities . . .").

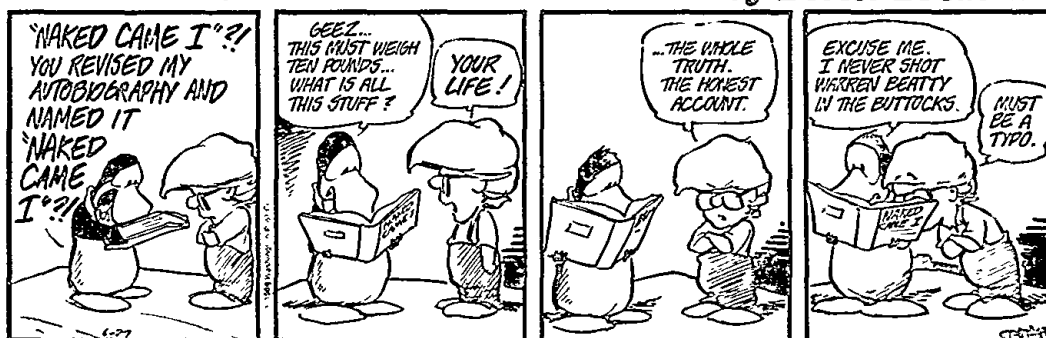
123. Published autobiographies create similar problems. For example, *New York Times* journalist Walter Duranty "never once saw his parents or his sister after his graduation from Cambridge, although they lived on for decades; [but,] in an autobiography written in his last years . . . he conveniently orphaned himself, an *only* child, when he was 10." Francine du Plessix Gray, *N.Y. Times*, June 24, 1990, § 7 (Book Review), at 3, col. 2; cf. Berke Breathed, *Bloom County*, *Washington Post*, June 27, 1989, at D23 (© 1990. *Washington Post Writers Group*. Reprinted with permission.):

how to recognize these tranquil moments of simple identity?"¹²⁴

Walt Whitman, for example, altered "him" to "her" in his writing.¹²⁵ Alexander Pope, Horace Walpole, and Lady Mary Wortley Montagu "re-wrote their own letters with an eye to posterity."¹²⁶ Diarists' recollections of the same event often differ.¹²⁷ Until the Cornell collection of James Joyce's sexually explicit letters was revealed, Joyce was thought to be "an overcontrolled, mannered correspondent."¹²⁸ And John Steinbeck, who extensively discussed his work in his private papers, "really tells very little about what he is thinking . . ."¹²⁹ On the other hand, Harriet Beecher Stowe's letters to George Eliot, one of which effused "I love you—and I talk to you sometimes when I am quite alone so earnestly that I should think you must know it even across an ocean," might signal stronger emotions to a reader unaware of the common use of such intimate language by nineteenth-century female correspondents.¹³⁰ Uncovering one simple succinct "fact" in these words is therefore quite difficult. Thomas Carlyle asked, "What are your historical Facts; still more your biographical? Wilt thou know a Man, above all a Mankind, by stringing-together beadrolls of what thou namest Facts?"¹³¹ The belief that these words do not communicate important infor-

BLOOM COUNTY

by Berke Breathed



124. RICHARD ELLMANN, *Freud and Literary Biography*, in *A LONG THE RIVERRUN* 256, 269 (1989).

125. See Justin Kaplan, *The Naked Self and Other Problems*, in *TELLING LIVES: THE BIOGRAPHER'S ART* 36, 54 (M. Pachter ed. 1985) [hereinafter *TELLING LIVES*]. Kaplan notes that Whitman also reordered sequences of his love poems, removed pages from his notebooks, and exchanged men's initials for a numerical code.

126. JAMES L. CLIFFORD, *FROM PUZZLES TO PORTRAITS: PROBLEMS OF A LITERARY BIOGRAPHER* 4-5 (1970); see also R. ALTICK, *supra* note 1, at 200-03 (discussing Pope's and Walpole's revisions of personal letters). Professor Rampersad notes that Langston Hughes's papers appear to change after 1942-43, when he realized they might be seen by larger number of people. See Talk by Arnold Rampersad, *supra* note 70.

127. J. CLIFFORD, *supra* note 126, at 75-79.

128. BRENDA MADDOX, *NORA: A BIOGRAPHY OF NORA JOYCE* 386 (1988).

129. Wilson Snipes, *A Preliminary to Literary Biography: The Chronicle Collection of Selected Documents*, 9 *BIOGRAPHY* 126, 137 (1986) (quoting Steinbeck biographer, Jackson J. Benson, in an analysis of versions of the chronicle method of biography—creating a biographical life by selecting material written by the subject).

130. See Marlene Springer, *Stowe and Eliot: An Epistolary Friendship*, 9 *BIOGRAPHY* 59, 80 (1986) (quoting Letter from Stowe to Eliot (May 25, 1989)).

131. THOMAS CARLYLE, *SARTOR RESARTUS* 203 (C. Harrold ed. 1937), quoted in I.B. NADEL, *supra* note 119, at 5.

mation is unrealistic, for their very expression helps us understand the subject.

Confronted with judicial presumption under the fact/expression dichotomy, the biographer must ignore the "fateful uncertainty"¹³² so often evident in literary texts; she or he must abandon the knowledge that the "expression"—the very words used by the subject—often is as close as a biographer will come to "fact." To declare the underlying "fact" of the "expression" or rephrase the "expression" may tell a different story than that told by the original writer. And no reminder will appear to caution the reader about the interpretive nature of the alteration.¹³³ Thus, because the biography permitted by the fact/expression dichotomy prohibits use of quotations without the permission of the copyright owner, the biographer must divide the unauthorized quotations into two categories. The first will appear as mere footnote sources for statements presented in the biography with the authority of "fact." The second, "expression," will disappear from human history.

In sorting out "fact" from "expression," the biographer becomes an unconscious adherent to the law's acceptance of objectivity. The resulting biography will give the reader no qualms over her or his assumption of objectivity. "Facts" will be supported by footnotes to obscure references or not supported at all. Biographical subjects will appear to have easily described motives and unambiguous emotions. The inability to quote unpublished materials will imply that an author's tone and voice do not change according to the time (e.g., before or after fame or notoriety), place (e.g., at work, at home, on vacation), or manner (e.g., a letter to a family member, lover, or enemy, a diary, or a published book).

Moreover, the inability to use quotations as fact to support a controversial or unusual interpretation discourages insightful and meaningful biographies. In their place will appear books that reinforce popularly accepted "truths" about the subject and avoid primary document research; after all, what's the point of research if a good unpublished quotation can be used only where the biographer can find some way to rephrase it as a "fact." Hence, through the fact/expression dichotomy and its underlying assumption of objectivity, the law nudges biographers into writing biographies that will be passively and unquestioningly read.

132. CATHERINE DRINKER BOWEN, *BIOGRAPHY: THE CRAFT AND THE CALLING* 70 (1969). Bowen uses this phrase in discussing the difficulty of communicating the existence of past uncertainty when the reader knows the outcome. I believe the phrase aptly describes the nearly opposite situation the biographer confronts in using unpublished materials: communicating to the reader the uncertainty of the biographer's interpretation while simultaneously stating the interpretation in a book—a format we tend to perceive as "the truth."

133. In *Salinger v. Random House, Inc.*, Judge Leval noted, "[t]o the extent [the biographer] departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description." 650 F. Supp. 413, 424 (S.D.N.Y. 1986). To comprehend his point, imagine funhouse mirrors. A biographer's departure may be an elongated version of the subject's words. The reader, however, does not perceive that she or he is inside the funhouse and consequently accepts the reflection as one seen in an ordinary mirror.

2. *The narrow fair use interpretation.*

The legal background. The other copyright doctrine that affects biographers is fair use, an affirmative statutory defense to infringement.¹³⁴ The text of the 1976 statute seems to apply fair use to *all* copyrighted materials.¹³⁵ Courts, however, have limited severely the breadth of the fair use privilege for unpublished materials¹³⁶ by implying a published/unpublished distinction into the second fair use factor—the nature of the copyrighted work.¹³⁷ Register of Copyrights Ralph Oman, in his statement for the recent congressional hearings,¹³⁸ wrote that “nothing in the current statute prohibits the application of fair use to unpublished works. Nor do any other court decisions prohibit *any* use of unpublished works. There is certainly a dispute over the scope of the availability of fair use to unpublished works”¹³⁹ Regardless of the outcome of the congressional action, the majority

134. 17 U.S.C. § 107 (1988); see note 36 *supra*; see also WILLIAM F. PATRY, *THE FAIR USE PRIVILEGE IN COPYRIGHT LAW* 18-64 (1985). Prior to the 1976 Act, which codified the judicially-crafted fair use doctrine, fair use could have been seen as “falling outside the orbit of copyright protection and hence never an infringement at all.” Alan Latman, *Fair Use of Copyrighted Works* (1958), in 2 *STUDIES ON COPYRIGHT*, *supra* note 58, at 781, 784; see also *Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, in 2 *STUDIES ON COPYRIGHT*, *supra* note 58, at 1199, 1224-25. After two Supreme Court cases exploring fair use (*Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), and *Sony Corp. v. Universal City Studios*, 464 U.S. 417 (1984)), the doctrine has received increased scholarly attention. Some commentators have insisted that the purpose of fair use is “the encouragement of creativity.” W. PATRY, *supra*, at xii; see also Dratler, *supra* note 44, at 246-47. Others have sought to modify fair use to achieve greater substantive goals, see Fisher, *supra* note 44, at 1780-83, or to employ fair use as an “equitable rule of reason” to balance the seemingly monopolistic tendencies of copyright, see John Shelton Lawrence, *Copyright Law, Fair Use, and the Academy: An Introduction*, in *FAIR USE AND FREE INQUIRY* 3, 10 (J.S. Lawrence & B. Timberg 2d ed. 1989). Professor Gordon notes that the fair use doctrine aims “to ensure that rights over copying will not significantly inhibit liberties that are essential to human self-expressiveness or to political life.” Gordon, *supra* note 66, at 1384 n.189. Finally, some have seen fair use as a way for copyright to avoid conflict with the first amendment. See Swanson, *supra* note 94, at 10-11. Others have suggested that direct first amendment claims be added to those of fair use. See Harry N. Rosenfield, *The American Constitution, Free Inquiry, and the Law*, in *FAIR USE AND FREE INQUIRY*, *supra*, at 295-96; Yen, *supra* note 94. But see Melville B. Nimmer, *Does Copyright Abridge the First Amendment Guarantees of Free Speech and Press?*, 17 *UCLA L. REV.* 1180 (1970) (explaining that unlike the fair use defense, a first amendment defense would not falter when confronted with an impairment of marketability). For a discussion of the issue prior to the Supreme Court’s *Harper & Row* decision, see W. PATRY, *supra*, at 461-73; see also text accompanying notes 92-94 *supra*.

135. For the text of the statute, see note 36 *supra*.

136. In *Harper & Row*, the Court stated that “the scope of fair use is narrower with respect to unpublished works.” 471 U.S. at 564; see note 44 *supra*.

137. See *Harper & Row*, 471 U.S. at 563-64; cf. Dratler, *supra* note 44, at 284-85 (advocating making unpublished status a separate factor). The published/unpublished distinction within fair use appears identical to the old published/unpublished dichotomy. This dichotomy developed in response to the 1909 Act, which granted federal copyright at publication, leaving unpublished works covered by the broad and perpetual, albeit somewhat ineffective, common law copyright protection. See Dana, *supra* note 58, at 357-59. The 1976 Act replaced “publication” with “creation” or “fixation” as the dividing line between statutory and common law protection. Copyright protection extends for the life of the author plus fifty years following death. 17 U.S.C. § 301 (1988). For a further discussion of the effect of the 1909 and 1976 Acts on unpublished documents, see Dana, *supra* note 58, at 353-64.

138. See notes 5, 6, & 61-64 *supra* and accompanying texts.

139. *Hearings*, *supra* note 6, at 63 (statement of Ralph Oman) (emphasis in original); see *id.* at 5 (statement of Barbara Ringer) (“there now seems to be considerable agreement among the majority

of commentators have not suggested eliminating the distinction.¹⁴⁰ Representative Kastenmeier stated that "[t]he bills seek to clarify that, while the unpublished nature of a work is certainly relevant to the fair use analysis, it should not alone be determinative."¹⁴¹

The published/unpublished distinction in fair use analysis derives from the perpetual copyright granted unpublished materials under common law copyright.¹⁴² The special consideration given to "unpublished" status draws on two concepts: the common law copyright in letters and more modern theories regarding a right not to speak. First, with regard to common law copyright, letters raised the need for special consideration of unpublished writings. Although written with the intention of being placed in another's possession, letters quickly became subject to unique rules.¹⁴³ The common law recognized that the sender of a letter retains copyright, even though the recipient owns the physical object.¹⁴⁴ The recipient's possession of the letter included the rights to display it to limited numbers of people, to sell it, and to destroy it.¹⁴⁵ Because the sender retained a right of first publication, however, the recipient could publish only sections of the letter, and only in narrow circumstances.¹⁴⁶

and minority judges . . . that the fair use doctrine can apply to copying of unpublished works [i.e., there is no *per se* rule]"); see also Benedict, *supra* note 58, at 879-81 (arguing that fair use should apply to published and unpublished documents).

140. For example, copyright expert Barbara Ringer testified that equating published and unpublished documents could have "mischievous effects." Washington Insider, *supra* note 62 (characterizing oral testimony of Barbara Ringer given at congressional hearings on S. 2370 and H.R. 4263). But see Barbara Ringer, *Copyright and the Historian*, 2 BIOGRAPHY 1, 13 (1979) (stating, after earlier discussing the 1976 Act's coverage of unpublished works, that "fair use applies to all users and to all sorts of works").

141. *Hearings*, *supra* note 6, at 3 (opening remarks of Rep. Robert W. Kastenmeier); see also *id.* at 5 (statement of Judge Leval); *id.* at 1 (statement of Judge Miner).

142. See *Salinger v. Random House, Inc.*, 650 F. Supp. 413, 420-22 (S.D.N.Y. 1986) (discussing fair use doctrine for unpublished materials with reference to common law copyright for unpublished Hemingway letters); note 136 *supra*.

143. This subject has received much scholarly comment. See, e.g., Michael Cohn, Rights in Private Letters, 8 BULL. COPYRIGHT SOC'Y 291 (1961) (discussing the dichotomy between physical object and "incorporeal right of ownership in the intellectual creation"); Hauhart, *supra* note 58; Alan Lee Zegas, *Personal Letters: A Dilemma for Copyright and Privacy Law*, 33 RUTGERS L. REV. 134 (1980) (student author) (discussing the historical development of the protection of private writings, including letters, from unauthorized uses); *Personal Letters: In Need of a Law of Their Own*, 44 IOWA L. REV. 705 (1959) (student author) [hereinafter *Personal Letters: In Need of a Law*] (reexamining existing law and how it affects the recipient and sender of private letters). Early American cases adopted English law: sending a letter did not transfer copyright, even as a gift, to the recipient. See, e.g., *Folsom v. Marsh*, 9 Fed. Cas. 342, 346-47 (C.C.D. Mass. 1841) (No. 4901). These cases did not distinguish between letters of a "mere private or domestic character" and those of a literary character. *Id.* at 346.

144. Hauhart, *supra* note 58, at 249-54; Zegas, *supra* note 143, at 139-42 (1980); *Personal Letters: In Need of a Law*, *supra* note 143, at 707-09. Showing the letter to sufficient numbers of people also established publication. See Hauhart, *supra* note 58, at 251.

145. See Cohn, *supra* note 143, at 292-93; Hauhart, *supra* note 58, at 248-49; Zegas, *supra* note 143, at 137-39; *Personal Letters: In Need of a Law*, *supra* note 143, at 705-07. Letters could not be sold as part of the estate to pay debts. *Id.* at 707.

146. See Cohn, *supra* note 143, at 296-99; Hauhart, *supra* note 58, at 250-54; Zegas, *supra* note 143, at 141-44. For example, publication was permitted to vindicate reputation or innocence on justifiable occasions. *Folsom*, 9 Fed. Cas. at 346-47. If the recipient was the government, publication was permitted for public purposes despite the sender's objections. See *id.* at 347.

Second, the "right to decide when and whether [a work] will be made public"¹⁴⁷ has been linked to a right not to speak. The Court stated in *Harper & Row* that the

right of first publication implicates a threshold decision by the author whether and in what form to release his work. . . . Because the potential damage to the author from judicially enforced "sharing" of the first publication right with unauthorized users of his manuscript is substantial, the balance of equities in evaluating such a claim of fair use inevitably shifts.¹⁴⁸

The Court and commentators have attempted to justify an author's right not to speak on the basis of notions of economic property,¹⁴⁹ traditional first amendment theory on the right not to speak,¹⁵⁰ and broad concerns about privacy.¹⁵¹

The legal assumption. Regardless of doctrinal justifications, the narrow fair use defense for unpublished documents presumes that until an author has published, she or he has signified an intent not to publish. The Senate report relied upon this assumption in analyzing reproduction for classroom purposes: "the work is unavailable . . . [as] the result of a deliberate choice on the part of the copyright owner. Under ordinary circumstances the copyright owner's 'right of first publication' would outweigh any 'other needs.'"¹⁵² The United States Copyright Office shares the assumption.¹⁵³ Catharine MacKinnon mockingly describes this fanciful world of presumptive equality: "If they write about it, they will be published. If certain experiences are never spoken about, if certain people or issues are seldom heard from, it is supposed that silence has been chosen."¹⁵⁴ Moreover, using "unpublished" as a proxy for authorial intent complements copyright's be-

147. *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 551 (1985).

148. *Id.* at 553.

149. Because an author's unpublished work is property, it falls under one of the "bundle of rights" conferred by section 106 of the Copyright Act. 17 U.S.C. § 106 (1988). See *Harper & Row*, 471 U.S. at 546-47.

150. The Court noted that the first amendment's right of free expression "includes both the right to speak freely and the right to refrain from speaking at all." *Harper & Row*, 471 U.S. at 559 (citing *Wooley v. Maynard*, 430 U.S. 705, 714 (1977)). Judge Newman, however, would disagree. He writes: "[A] private writing is only the barest extension of a private thought. Not even the most unyielding First Amendment argument . . . could seriously maintain that there is a right to let the world know the thoughts each one of us entertains in the recesses of our minds." Newman, *supra* note 77, at 471.

151. See Gordon, *supra* note 66, at 1376 & n.156; Newman, *supra* note 77, at 477. See also Cohn, *supra* note 143, at 296; Hauhart, *supra* note 58, at 254-59; Zegas, *supra* note 143, at 149-50; *Personal Letters: In Need of a Law*, *supra* note 143, at 712-15. Judge Miner finds all three justifications plausible. He suggests that "an author should have the right and the opportunity to hone, polish, refine, revise or discard his or her work prior to" public dissemination. Miner, *supra* note 57, at 9.

152. S. REP. NO. 473, 94th Cong., 1st Sess. 66 (1975).

153. See Benedict, *supra* note 58, at 869 n.42 (noting that the staff "consistently refers to authors as having 'chosen' not to publish, suggesting a conscious decision by authors" (quoting U.S. COPYRIGHT OFFICE, REPORT OF THE REGISTER OF COPYRIGHTS: LIBRARY REPRODUCTION OF COPYRIGHTED WORKS 105-06 (1983)); see also *id.* at 879. But see *Hearings*, *supra* note 6, at 65 (statement of Ralph Oman).

154. C. MACKINNON, *Francis Biddle's Sister: Pornography, Civil Rights, and Speech*, in FEMINISM UNMODIFIED, *supra* note 107, at 163, 168.

lief that monopolies promote creativity¹⁵⁵ and the broader legal understanding that the realization of rights does not require assistance.¹⁵⁶ Having assumed that nonpublication signals an unquestionable intent not to publish, current doctrine makes it nearly impossible for any author quoting or paraphrasing unpublished expression to prevail in a fair use defense.¹⁵⁷

Questioning the validity of the assumption. The assumption that "unpublished" status tells us anything about authorial intent is open to dispute.¹⁵⁸ Literary theorists¹⁵⁹ and philosophers¹⁶⁰ have questioned the usefulness, and even the existence, of authorial intent. Rather than explore the critique of intent from these academic perspectives, I adopt a less theoretical and more illustrative approach. My examples fall into two rough categories and cast doubt on whether we can ever determine author's intent. Although the published/unpublished distinction in fair use pretends otherwise, authorial intent is a notoriously complex issue.

First, economic, social, and cultural factors ensure that not all unpublished manuscripts will be published. Publication usually depends on acceptance of the manuscript by a publishing house or magazine. A published author often finds getting published easy, while many an unpublished author will struggle. The manuscript's acceptance also depends on public demand for a given genre or style. Moreover, other factors may influence the decision, as the public may not want to read certain authors for gender,¹⁶¹ ra-

155. Two disquieting notions arise when one questions whether economic incentives actually do affect whether authors choose to "publish." First, if there are authors who would write regardless of compensation or who would allow the uncompensated use of their material, then the extent to which monopoly exerts influence seems questionable. Second, if authors cannot be published because either their works will not achieve sufficient economic profit or the monopoly has created a narrow public demand, then the ability of the monopoly to create a diverse and open market seems questionable. Whether economic incentives provide a rationale for copyright, of course, has been much debated. For economic analyses, see Fisher, *supra* note 44, at 1698-1744; Gordon, *supra* note 66, at 1388-94.

156. For example, if an author possesses a right to publish, and she or he does not exercise the right, two conclusions are possible. Either the author wants to exercise the right but cannot do so because of social conditions (see text accompanying notes 161-167 *infra*), or the nonexercise of the right represents a conscious decision. Courts, however, do not favor the idea that the government has affirmative obligations to overcome those social conditions that make it difficult to exercise rights. Cf. *Harris v. McRae*, 448 U.S. 297, 317-18 (1979), *reh'g denied*, 448 U.S. 917 (1980) (government need not provide federal funding for abortions even though the Constitution has been held to guarantee the right to an abortion). Hence, the intentional interpretation is preferable.

157. Floyd Abrams has argued that the question of whether expression is published or unpublished ends the four factor analysis "before it begins." See *Hearings*, *supra* note 6, at 13 (statement of Floyd Abrams).

158. See Benedict, *supra* note 58, at 880 (noting that the "presumption that all authors of unpublished materials consciously intended to avoid publication . . . may seem naive to historians"); Kernochan, *supra* note 58, at 322; see also Cohn, *supra* note 143, at 296-98.

159. See, e.g., ROLAND BARTHES, *The Death of the Author*, in IMAGE-MUSIC-TEXT 142 (S. Heath trans. 1977).

160. The literature of paternalism offers one exploration of the philosophical intent issue. See generally PATERNALISM (R. Sartorius ed. 1984).

161. For example, many of the characteristics for which nineteenth-century male authors were admired would have been considered "unbearably presumptuous in a woman writer." CAROLYN G. HEILBRUN, *Writing a Woman's Life* 111 (1988). Out of necessity, many women adopted male pseudonyms, the most famous being the Brontës (Acton, Currer, and Ellis Bell), Marion Evans

cial,¹⁶² class,¹⁶³ ethnic, or political reasons. The subject matter may also doom the manuscript. For example, Virginia Woolf faced "the ridicule, misery, and anxiety the patriarchy holds in store for those who express their anger about the enforced destiny of women."¹⁶⁴ Not every writer can find a press to express her or his views. The legal doctrine consequently makes it easier for historians to quote from the work of those who have had the opportunity to choose to publish.

Moreover, the form of many materials mandates that they remain legally "unpublished." Letters tend to be published as a collection only when sufficient public interest in their author has been generated—ironically, often by biographies. Hence, little-known persons with fantastic letter collections, which could be fodder for a biography that would elevate the person to fame, will remain undiscovered. Even if a letter collection is published, the entire corpus of letters rarely will be.¹⁶⁵ Who would "publish" the 36,000 documents that comprise the Oliver Wendell Holmes papers?¹⁶⁶ Who would read books filled only with authors' annotations in books, grocery lists, telephone scribbles, memoranda, and signed Hallmark cards?¹⁶⁷ As these examples show, "unpublished" status is often not the result of authorial intent.

Second, determining whether a deceased author would have wanted to publish while alive is an equally uncertain task. When an author dies, the copyright often passes to the family or executors.¹⁶⁸ Without their consent—either to use unpublished materials in a biography or to publish them—the materials will never be used. Although copyright law treats the

(George Eliot), and Amantine Lucille Aurore Dupin Dudevant (George Sand). See VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 50 (1957).

162. The number of biographies about persons of color has increased dramatically in recent years.

163. Class status raises problems similar to those of gender and race. Virginia Woolf wrote of the Elizabethan middle-class woman: "She never writes her own life and scarcely keeps a diary; there are only a handful of her letters in existence. She left no plays or poems by which we can judge her." V. WOOLF, *supra* note 161, at 46.

164. C. HEILBRUN, *supra* note 161, at 125.

165. Existing collections of unpublished letters are often enormous. Over 70,000 letters survive relating to Lord Alfred Tennyson. See Stephen Canham, *Interview-Review: Robert B. Martin*, 2 BIOGRAPHY 74, 75 (1982). Eight thousand letters of Leonard Woolf's survive. See Leon Edel, *So Much More Than Virginia's Husband*, N.Y. Times, Oct. 29, 1989, § 7 (Book Review), at 7, col. 1 (reviewing LETTERS OF LEONARD WOOLF (F. Spotts ed. 1989)); see also R. ALTICK, *supra* note 1, at 311 n.5 (noting that Lewis Carroll's "Register of Correspondence" records 98,721 letters received or written from 1861 to 1898). Diaries are also rarely published in complete form. See J. GARRATY, *supra* note 19, at 193. Women's diaries have had even less of an opportunity to be published than have men's. See PRIVATE PAGES: DIARIES OF AMERICAN WOMEN, 1830s-1970s, at xiv (P. Franklin ed. 1986).

166. See SHELDON M. NOVICK, *HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES* xvi (1989).

167. Such items, however, do have an audience. Annotations, for example, can greatly increase the value of a book on the rare book market. Interview with David Warrington, Assistant Librarian for Special Collections, Harvard Law Library, in Cambridge, Mass. (Feb. 23, 1990).

168. 17 U.S.C. § 201(d)(1) (1988) ("The ownership of a copyright . . . may be bequeathed by will or pass as personal property by the appropriate laws of intestate succession"). I use "family and executors" loosely here. The copyright can be left to various entities.

decision of heirs as a proxy for authorial intent, these heirs often may have other motivations. The family may bar publication because it seeks privacy for *itself* or desires to preserve a particular image of the author.¹⁶⁹ Family members may care more about monetary gain than the author would have, and hence refuse to publish until a high enough price can be assured.¹⁷⁰ The heirs may have neither the time nor the interest to publish. Even if the heirs allow publication of the author's writing, it does not necessarily follow that their decision is that of the author's. Because of good intentions, hope of monetary gain, or public demand, the heirs may publish material in a forum the author might have disliked or even detested.¹⁷¹ As one reviewer wrote about the publication of the unpublished and unfinished poems of Philip Larkin:

Had Larkin lived longer, there would eventually have had to be one more slim volume, even if slimmer than slim. But that any of the earlier suppressed poems would have gone into it seems very unlikely. The better they are, the better must have been his reasons for holding them back. Admittedly, the fact that he did not destroy them is some evidence that he was not averse to their being published after his death. As a seasoned campaigner for the preservation of British holograph manuscripts . . . he obviously thought that his own archive should be kept safe. But the question of *how* the suppressed poems should be published has now been answered: some other way than this.¹⁷²

Even where the author appears to indicate, either in a will or other statement, her or his intention regarding publication, such statements may not guarantee later compliance. Many authors have requested that their unpublished work be destroyed or censored upon their death; few of these requests have been honored.¹⁷³ The refusal to follow such instructions reveals that

169. For instance, Alice James kept a diary that she had wanted published. After her death, Katherine Loring had copies privately printed in 1894 for herself and James's brothers, William and Henry. Fearing the names and descriptions in the diary, Henry James wanted the diary to remain unpublished or published only in an edited form, after which he would burn the original. An edited version, with initials substituted for full names, eventually was published in 1934. Only in 1964 did the entire diary appear as Alice James had hoped. See JEAN STROUSE, *ALICE JAMES: A BIOGRAPHY* 319-26 (1980).

170. See, e.g., *To Auction the Mahatma's Letters Is Not the Gandhian Way*, N.Y. Times, Dec. 1, 1989, at A34, col. 3 (letter from the granddaughter of Mahatma Gandhi, suggesting that her cousin's attempt to auction Gandhi's letters would betray his intentions). Or they may prefer to try their own hand at biography. See John Lewis Gaddis, *Dean Rusk's Personal Truce*, N.Y. Times, July 1, 1990, § 7 (Book Review), at 3, col. 1 (noting "[p]rofessional historians generally frown on efforts by the offspring of the famous to undertake biographical projects . . . the temptations of fileopietism too often overshadow the advantages of access and familiarity").

171. Bernard Malamud's executors decided to publish his unpublished stories, although they confronted the question of "[h]ow will the author's reputation withstand the examination of work never finished?" Bette Pesetsky, *Schlemiel of the Golden West*, N.Y. Times, Nov. 19, 1989, § 7 (Book Review), at 7, col. 1.

172. Clive James, *Somewhere Becoming Rain*, NEW YORKER, July 17, 1989, at 88, 90 (reviewing PHILIP LARKIN, *COLLECTED POEMS* (A. Thwaite ed. 1988)).

173. H.L. Mencken bequeathed his diary to the Enoch Pratt Free Library. In a separate memorandum to his executors he wrote:

This diary is to be deposited by my Executors on the understanding that it is not to be put at the disposal of readers until twenty-five years after my death, and is then to be open

authorial intent has often been interpreted in a loose manner with ample consideration given to contemporary circumstances. As Samuel Beckett's biographer noted, "Beckett says 'Destroy my letter,' the way other people say, 'Have a nice day.' They should know he doesn't always mean it."¹⁷⁴ Max Brod's experience with Franz Kafka demonstrates a similar twist on interpreting authorial intent. Brod wrote that, while alive, Kafka never wanted to publish his manuscripts;¹⁷⁵ nevertheless, he was pleased by each book's eventual publication. At death, Kafka left a note asking Brod to "burn[] unread" all of his diaries, manuscripts, letters, and sketches, as well as those held by others. Brod notes he had previously joked to Kafka that he could not do such a thing: "Kafka's unpublished work contains the most wonderful treasures" Assuming that Kafka's final request deserved as much credence as his prior ones, Brod did not burn the papers or the manuscript of *The Trial*.

Even the burning or the destruction of some papers¹⁷⁶ does not necessarily reveal an authorial intent not to publish others. The writer usually can only destroy letters that she or he receives.¹⁷⁷ Charles Dickens's fire of 1860

only to students engaged in critical or historical investigation, approved after proper inquiry by the Chief Librarian.

70 Op. Md. Att'y Gen. 213, 214 (1985). The Maryland Attorney General found that the library could publish an edited version because the memorandum was not legally enforceable. *See id.* at 216-17.

W.H. Auden's request to his friends to burn his letters has been ignored. *See* L. EDEL, *supra* note 10, at 22. T.S. Eliot and George Orwell "stipulated that no biography be written of them, at least with any help from their widows." R. ELLMANN, *supra* note 10, at 1 (1973); *see also* Leon Edel, *The Figure Under the Carpet*, in TELLING LIVES, *supra* note 125, at 16, 21. Willa Cather and Ernest Hemingway established injunctions against letter publication. R. ALTICK, *supra* note 1, at 308. In any case, authorization can be unclear. For example, Sir Richard Burton's wife claimed that his ghost had appeared to her and commanded the burning of his papers. *See* Anthony Burgess, *Living for Sex and Danger*, N.Y. Times, May 20, 1990, § 7 (Book Review), at 1, 26, col. 3.

Many families have shared information and donated letters without access restrictions. *See* R. ALTICK, *supra* note 1, at 309-10.

174. James, *supra* note 59, at C13, col. 1, C16, col. 5.

175. Max Brod, *Postscript*, in FRANZ KAFKA, THE TRIAL 326-35 (Modern Library ed. 1956) (quoted in LAW, LANGUAGE, AND ETHICS: AN INTRODUCTION TO LAW AND LEGAL METHOD 1-5 (W. Bishin & C. Stone eds. 1972)).

176. Burning letters has been a favorite occupation. Burners include Robert Browning, Charles Dickens, Henry James, Thomas Hardy, Benjamin Jowett, Cassandra Austen, and Hallam Tennyson. *See* R. ALTICK, *supra* note 1, at 160-63.

Archivists fear the smell of burnt letters. Their hesitation to advocate legally required liberal access policies reflects their belief that such policies may lead people to burn documents. For a discussion of archival donations and access policies, *see* GARY M. PETERSON & TRUDY HUSKAMP PETERSON, ARCHIVES & MANUSCRIPTS: LAW 24-61 (1985). *See also* Interview with Rodney Dennis, Curator of Manuscripts, Harvard College Library, in Cambridge, Mass. (Oct. 2, 1989); Interviews with Gerald Ham, State Archivist, Michael Stevens, Assistant State Archivist, and Barbara Kaiser, Head of Collection Development, Wisconsin State Historical Society, in Madison, Wis. (Aug. 14, 1989).

The Supreme Court's holding in *California v. Greenwood*, 486 U.S. 35 (1988), suggests that burning may be the best form of destruction. At least for fourth amendment purposes, people do not have a reasonable expectation of privacy in garbage. Chester A. Arthur played it safe: He put his letters in garbage cans and then burned them. *See* Geoffrey Ward, *FDR and the First Presidential Library*, SMITHSONIAN, Dec. 1989, at 58.

177. Henry James burned most of Edith Wharton's correspondence in 1902, whereas she kept his. *See* Michiko Kakutani, *Letters from an Unlikely Literary Friendship*, N.Y. Times, Jan. 9, 1990,

is infamous: "This strange performance, shaking off the claims of friendship, dead joys, secret presents, leaves Dickens alone under a stubborn spotlight. His letters to others copiously survive; theirs have been consumed away."¹⁷⁸ Others have revised or selectively destroyed materials to leave the image of themselves that they want discovered.¹⁷⁹ Moreover, the author may have intended to leave for discovery what she or he did not destroy.¹⁸⁰

Most importantly, an author's decision to prevent publication or attempt to destroy materials may have been the result of social factors. The author may have feared public reaction to personal lifestyle or social choice recorded by the materials she or he destroyed. Over time, public opinion changes; it may not be as intolerant as an author supposes, or a careful biographer may be able to control public reaction to the subject's choice. Authorial intent arises out of a context and when that context changes, so should interpretation of the intent.

Hence, although establishing an intention not to publish is complex and ambiguous, and an author might have accepted a biographer borrowing a few words, the legal doctrine assumes that anything "unpublished" creates not just a presumption of intention never to publish, but the irrefutable proof.

Effect on biography. The assumption that unpublished materials were not intended for publication all but blocks the use of these materials without consent of the copyright holder.¹⁸¹ Biographers do not advocate extensive quotation;¹⁸² however, under current law, they face the risk of litigation and a finding of infringement if they paraphrase or quote "more than minimal amounts" of expression.¹⁸³ Biographer Milton Lomask advises, "You must change more than the words—you must change their order and construc-

at C18, col. 3. He also burned the letters he received from his sister Alice, although those he sent to her survive. See Jean Strouse, *Semiprivate Lives*, in *STUDIES IN BIOGRAPHY* (D. Aaron ed. 1978), at 113, 121. Men appear to have burnt letters from women more often than women have burned those from men. Interview with Rodney Dennis, *supra* note 176.

178. Gillian Beer, *The Original Performance Artist*, N.Y. Times, Nov. 13, 1988, § 7 (Book Review), at 3, col. 2.

179. Walt Whitman is a notable example. See note 125 *supra*. In addition, Anne Frank revised her diary, intending that it be read. See Judith Thurman, *Not Even a Nice Girl*, NEW YORKER, Dec. 18, 1989, at 116, 117; see also *A DAY AT A TIME: THE DIARY LITERATURE OF AMERICAN WOMEN FROM 1764 TO THE PRESENT* 3, 7, 8-9 (M. Culley ed. 1985). And Theodore Roosevelt wrote "posterity letters" "filled with distortions." J. GARRATY, *supra* note 19, at 180.

180. The executor of Justice Benjamin Cardozo's estate disposed of his correspondence after Cardozo's death. Cardozo appears to have intended to leave this material, having previously destroyed documents about which he was concerned. Interview with Andrew L. Kaufman, *supra* note 67. Tennyson's son, Hallam, burned material after he wrote the biography of his father. See Canham, *supra* note 165, at 77.

181. See note 157 *supra* and accompanying text. For example, Salinger pursues his no publication policy to ensure his privacy while alive. Who knows whether he plans to guarantee his privacy from the grave.

182. See L. EDEL, *supra* note 10, at 103 (noting "if a biographer feels strongly that he should let his subject speak for himself, he should refrain from writing a biography and edit his letters and papers instead").

183. *New Era Publications, Int'l v. Henry Holt & Co.*, 873 F.2d 576, 584 (2d Cir. 1989). It is unclear what constitutes "more than minimal amounts"; however, no appellate court has yet to find fair use.

tion."¹⁸⁴ Imagine for a moment a broader fair use privilege than that which currently exists for unpublished materials. The biographer could take the risk and include the quotation, hoping either that no suit will be brought or that she or he will win in court. Many biographers preparing their books no doubt share the initial impression held by Ian Hamilton: "Was there not a doctrine of fair use to be invoked somewhere along the line?"¹⁸⁵ But under the extremely narrow fair use interpretation, the biographer has no legitimate rationale to use the materials even if little likelihood of a suit appears.¹⁸⁶ The law places the burden on the biographer to obtain consent from the copyright holder or not use the copyrighted material. Moreover, the biographer who uses the material, is sued, and is found to have infringed the copyright, must delete the infringing material or be enjoined from publication. As the *New Era* court stated, "[t]he 'prohibitive' expense of republication after deletion of improperly included material is without more an inevitable consequence of breach of copyright."¹⁸⁷ Fearing these consequences, publishers will hesitate to print biographies containing any potentially infringing material.¹⁸⁸

Even the biographer who attempts to comply with the law will be frustrated. Under the narrow fair use interpretation, a biographer must contact the author, executor, or heir of every item that she or he anticipates quoting or paraphrasing.¹⁸⁹ Copyright ownership may be unclear, making the attempt to obtain consent extremely difficult, if not impossible. The subject's papers may include correspondence in which the sender can no longer be identified, or the sender's family has moved, died, or changed names. As a practical matter, searching for the copyright holder will be inefficient if the biographer intends to use only a sentence. And even if found, the copyright holder still may withhold consent¹⁹⁰ or condition it on family control of the content of the biography. Abraham Lincoln caustically proposed the manufacturing of blank biographies for families and friends, which they could "fill up with rosy sentences full of high-sounding praise."¹⁹¹ Some authorized

184. M. LOMASK, *supra* note 14, at 140. Of course, not all biographers have perceived the law as particularly important. One author stated, "If the biographer is fortunate enough to have a large amount of original source material . . . and this material has some literary quality, then his task is comparatively simple. He can choose from that material the parts which will best serve his purpose and let the man speak for himself. EDWARD H. O'NEILL, A HISTORY OF AMERICAN BIOGRAPHY 1800-1935, at 9 (1935).

185. I. HAMILTON, *supra* note 45, at 67.

186. For two excellent statements of the impact of the current doctrine on biography and historiography, see *Hearings*, *supra* note 6 (statements of Taylor Branch and J. Anthony Lukas).

187. *New Era*, 873 F.2d at 584.

188. See notes 69-71 *supra* and accompanying text (discussing consequences of *Salinger* and *New Era* on the publishing industry); Interview with Linda Simon, *supra* note 67.

189. For a fascinating story of the legal and contractual maneuvers involved in preparing a biography, see Phillip Knightley, *T.E. Lawrence*, in *THE CRAFT OF LITERARY BIOGRAPHY* 154-72 (J. Meyers ed. 1985); see also J. CLIFFORD, *supra* note 126, at 26-28, 32-33.

190. Interview with Linda Simon, *supra* note 67.

191. J. GARRATY, *supra* note 19, at 103; Interview with Thomas C. Reeves, *supra* note 120 ("authorized biography emasculates biography"). The monopolistic control over papers that authorized biographies grant can endlessly delay publication of a biography. For example, Oliver Wendell Holmes died in 1935; exclusive access to the Holmes papers was given to a long line of

biographers possess relatively broad freedom; but, even “[f]riendly relations” with the family create an “unspoken restraint on writing anything nasty.”¹⁹²

Hence, to avoid acting illegally, a biographer may have to accept the legal assumption that every unpublished piece of material was never intended by its author to be published. This decision may eliminate from biography any inclusion of the author’s voice outside of published documents, as well as any use of the author’s writing to convey an ambiguous point or illustrate an interpretation. Biographical alternatives are somewhat unpleasant: the biographer can paraphrase the material and omit the source, hoping that no one will track down the original document and claim copyright; become an authorized biographer beholden to the authorizer; or retreat into the objectivity conundrum by stating an interpretation of an unpublished document as fact, knowing that few readers will bother to track down the citation and compare the unpublished source. Hence, the law promotes either those biographies that avoid research in primary documents and deny reliance upon them in writing, or those that erect a façade of historical objectivity. The subtle forces that initially denied certain authors the possibility of being published will remain invisible, masked by biographical quotation of only the published voice. Moreover, biography will not encourage the reader to embark on the complex deciphering of an author’s beliefs. Without quotations from unpublished materials, the author’s intent on numerous issues mentioned in such materials may appear clear and uncontestable—whatever the biographer tells the reader. The biography will not provoke the reader to question the degree to which understandings of intent are interpretation. In the end, the reader will not wonder about the motivations of the subject, nor, more importantly, about those of the biographer.

B. Privacy

Ideas about privacy also affect the use of unpublished materials in biography. Commentators have discussed the relation between copyright and privacy for a century. Some have argued that copyright doctrine does or

authorized biographers—Felix Frankfurter, Mark DeWolfe Howe, and Grant Gilmore—none of whom completed the biography. Holmes’s biography finally appeared, written by Sheldon Novick, a nonauthorized biographer, who, nonetheless, was given access to the papers. See S. NOVICK, *supra* note 166, at xvi.

192. Barbara W. Tuchman, *Biography as a Prism of History*, in TELLING LIVES, *supra* note 125, at 132, 143.

Other biographers and critics have discussed the privileges and burdens of being an authorized biographer and friend. See, e.g., Hayden Herrera, “I’m Going to Live a Different Life,” N.Y. Times, Nov. 5, 1989, § 7 (Book Review), at 3, col. 1 (biographer reviewing ROXANA ROBINSON, GEORGIA O’KEEFE: A LIFE (1989), and criticizing author for avoiding the issue of O’Keefe’s bisexuality); John W. Aldridge, *The Count of Rowan Oate*, N.Y. Times, May 14, 1989, § 7 (Book Review), at 3, col. 1 (noting that FREDERICK R. KARL, WILLIAM FAULKNER: AMERICAN WRITER—A BIOGRAPHY (1989), did not emphasize Faulkner’s affairs and drinking).

The same problems occur in editing letters. See Gerald N. Grob, *Dear Dr. Karl*, N.Y. Times, Mar. 19, 1989, § 7 (Book Review), at 25, col. 2 (reviewing THE SELECTED CORRESPONDENCE OF KARL A. MENNINGER, 1919-1948 (H. Faulkner & V. Pruitt eds. 1988), and noting that Menninger may have played a role in the editing process).

should address privacy concerns.¹⁹³ Others have insisted that copyright law does not encompass privacy interests.¹⁹⁴ Nevertheless, it seems counterintuitive to discuss how biographers use unpublished documents without examining privacy issues. Even those who reject the idea that copyright law should account for "privacy" concerns resort to "privacy" when discussing the differences among works with "unpublished" status.¹⁹⁵

The legal background. Although privacy, broadly understood, has long been a concern, as a legal concept, privacy did not acquire significance in the United States until the publication of Samuel D. Warren and Louis D. Brandeis's classic article.¹⁹⁶ The authors argued that a right to privacy could be found in common law doctrines, including copyright protection for letters.¹⁹⁷ In the years following publication of the article, a tort-based theory of privacy aroused intense and controversial academic discussion.¹⁹⁸ Currently, most states recognize some version of a privacy law.¹⁹⁹ State law

193. See note 77 *supra*.

194. See, e.g., Leval, *supra* note 19, at 1119 n.67, 1129-30.

195. Compare *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1504 (S.D.N.Y. 1988) ("the protection of privacy is not the function of copyright law") with *id.* at 1505 ("in making a fair use analysis . . . privacy interests may be an appropriate consideration"). In this section, I do not discuss the many and complex types of common law privacy actions—right of publicity, false light depiction, public disclosure of private facts, and intrusion. The article, instead, focuses on broad generalizations about privacy that creep into copyright analysis.

196. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Warren and Brandeis feared the "[i]nstantaneous photographs and newspaper enterprise" that had "invaded the sacred precincts of private and domestic life." *Id.* at 195. Such inventions and methods, they argued, lowered social standards and morality. *Id.* at 196.

Analysts of the article have found significant the circumstances which prompted the article: the publication of newspaper accounts of the Warrens' elaborate entertaining. Brandeis's biographer provided this information. See Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 156, 159-63 (F. Schoeman ed. 1984) [hereinafter PHILOSOPHICAL DIMENSIONS OF PRIVACY].

197. See notes 143-146 *supra*. According to Warren and Brandeis, the right to privacy had to exist because copyright law could not satisfactorily explain judicial decisions that restricted the publication of the contents of letters or an "enumeration" of a series of letters. Warren & Brandeis, *supra* note 196, at 201. Thus the law protected not just property, but "inviolable personality." *Id.* at 205. The Warren-Brandeis conception of the right to privacy, however, was limited. They extended it only to living people, not to third persons. Their right to privacy did not extend to those who had "renounced the right to live their lives screened from public observation." *Id.* at 215. Furthermore, they emphasized that "no fixed formula be used to prohibit obnoxious publications." *Id.* By accepting this need for some to "lose" their right to privacy, Warren and Brandeis foreshadowed the fundamental contradiction between free speech and privacy. See RICHARD F. HIXSON, *PRIVACY IN A PUBLIC SOCIETY: HUMAN RIGHTS IN CONFLICT* 32-33 (1987).

198. See, e.g., Diane L. Zimmerman, *Requiem for a Heavyweight: A Farewell to Warren and Brandeis's Privacy Tort*, 68 CORNELL L. REV. 291, 294 (1983) ("Is it possible that the seemingly elegant vessel that Warren and Brandeis set afloat some nine decades ago is in fact a leaky ship which should at long last be scuttled?"); Harry Kalven, Jr., *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROBS. 326 (1966); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960) (suggesting four distinct infringements of the right to privacy). For an excellent selected bibliography, see PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 418-24. For a short history and critique of the privacy theory, see R. HIXSON, *supra* note 197, at 1-89.

199. See COMPILATION OF STATE AND FEDERAL PRIVACY LAWS 2 (R. Smith ed. 1988). These laws include those concerning access to various records and computer databases, drug and AIDS testing, wiretaps, privileges, as well as general privacy statutes or constitutional provisions. Not all states recognize a right to privacy at common law or in statutes. See *id.* at 29.

actions against biographers, however, are difficult to win.²⁰⁰ Moreover, constitutional law, particularly the first amendment, may limit the scope of common law privacy protection.²⁰¹ And even if some foundation for a right not to speak exists, the Supreme Court has not explicitly recognized the right as part of a constitutional right to privacy. Nevertheless, privacy concerns influence biographers through background assumptions about the motives and intentions of the biographer, and through the incorporation of privacy concerns into the weight given the "unpublished" status.²⁰²

Despite numerous discussions and cases predicated upon settling the meaning and scope of "privacy," the term has escaped definition. Commentators have debated the rights and interests, if any,²⁰³ that it encompasses.²⁰⁴ Nevertheless, conventional conceptions of privacy, manifested, for example, by "the right to be let alone," look inward.²⁰⁵ Alan Westin writes,

Viewed in terms of the relation of the individual to social participation, privacy is the voluntary and temporary withdrawal of a person from the general society through physical or psychological means, either in a state of solitude or small-group intimacy or, when among larger groups, in a condition of anonymity or reserve.²⁰⁶

Similarly, Anita Allen defines privacy as "a condition of inaccessibility of the person, his or her mental states, or information about the person to the senses or surveillance devices of others."²⁰⁷ And Ruth Gavison, attempting "to vindicate the way most of us think and talk about privacy issues," describes privacy as "a concern for limited accessibility."²⁰⁸ Judge Newman follows this line of commentators by discussing a "zone of privacy" from which the individual may "exclude the inquisitive public."²⁰⁹

200. See note 85 *supra*; see also Newman, *supra* note 77, at 476 (discussing preemption problems).

201. Cf. *Florida Star v. B.J.F.*, 109 S. Ct. 2603 (1989) (narrowly holding that imposing damages on a newspaper for violation of a state "privacy" statute prohibiting publication of sexual assault victims' names violated the first amendment).

202. See Dratler, *supra* note 44, at 284 ("[u]npublished works resound with overtones of privacy"). Privacy concerns could also justify extending protection to the use of facts from unpublished writing. See Newman, *supra* note 77, at 478. Preemption and first amendment concerns, however, could limit severely such an extension. Cf. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 559 (1985) ("We do not suggest this right not to speak would sanction abuse of the copyright owner's monopoly as an instrument to suppress facts.").

203. See Judith Jarvis Thompson, *The Right to Privacy*, in *RIGHTS, RESTITUTION AND RISK: ESSAYS IN MORAL THEORY* 117-34 (W. Parent ed. 1986) (arguing that violations of privacy rights may also be violations of other recognized rights).

204. For an excellent summary of various philosophical perspectives on privacy, see Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY*, *supra* note 196, at 1-33; see also ANITA L. ALLEN, *UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY* 1-53 (1988).

205. See generally L. TRIBE, *supra* note 93, § 15-1, at 1303.

206. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 7 (1967).

207. A. ALLEN, *supra* note 204, at 15.

208. Ruth Gavison, *Privacy and the Limits of the Law*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY*, *supra* note 196, at 346, 346-47.

209. Newman, *supra* note 77, at 465. Paul Weiss offers a somewhat more complex analysis, concluding that "privacy" is that element which makes distinctive, complex, recognizable persons. See PAUL WEISS, *PRIVACY* (1983).

As applied, this privacy zone or inaccessible space has tended to be equated with the realm of home, family, and intimates.²¹⁰ In addition, as state law privacy actions have shown, the right of privacy under this vision "terminates upon death."²¹¹ People can claim their own rights, but not those of others.²¹² Hence, privacy is "a personal right that . . . [can] only be invoked by and expired with the individual."²¹³

The legal assumption. This individualistic understanding of privacy assumes that an "individual" can be conceived of as distinct from the "society" in which she or he lives.²¹⁴ In other words, it perceives of people as egocentric creatures, possessing identities outside of and distinct from society. The boundaries of their respective identities only extend to the living physical body and the home. Thus, privacy arises, not from relationships among people, but from the absence of such relationships. Accepting such a presocial conception of the individual, the law enshrines a privacy right designed to ensure isolation.

Questioning the validity of the assumption. The idea of privacy as an individual- and zone-centered concept has been challenged on two fronts. One group of critics has denied that any "private" area exists apart from the "public" or society as a whole. The very idea of "privacy," they assert, may be the contrived product of a patriarchal society. Catharine MacKinnon writes,

"Private" means "inside the family." "Public" means the rest of the world. That is, the family is considered to be a truly private space, private for everyone in it. . . . To consider the home "private" is to privatize women's oppression and to render women's status a question of domestic relations to be analyzed as a derivative of the public sphere²¹⁵

Other scholars echo the belief that by calling certain aspects of life "private," they disappear from public and political consideration. Elizabeth Schneider, for example, writes that the phrase "the personal is political" reflects the

210. See P. WEISS, *supra* note 209, at xii; Newman, *supra* note 77, at 465; Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 626 (1986). One commentator explains that the common law privacy tort "posits a legal power to control the flow of information about one's self to other people." Zimmerman, *supra* note 198, at 293. She criticizes the tort for overlooking "the fact that genuine social values are served by encouraging a free exchange of personal information." *Id.* at 294.

211. Newman, *supra* note 77, at 475 (suggesting allowing an extremely limited time after death before termination to locate the executor and publisher); see *New Era Publications, Int'l v. Henry Holt & Co.*, 873 F.2d 576, 588 n.4 (2d Cir. 1989) (Oakes, J., concurring).

212. Savell, *supra* note 85, at 11; see *Rosemont Enterprises v. Random House, Inc.*, 58 Misc.2d 1, 7, 294 N.Y.S.2d 122, 129 (Sup. Ct. 1968) (stating that the right to privacy is "a purely personal one which may be enforced only by the party himself"); *Fasching v. Kallinger*, 211 N.J. Super. 26, 39-40, 510 A.2d 694, 701-02 (App. Div. 1986) (rejecting relational right of privacy).

213. Savell, *supra* note 85, at 10 n.43.

214. The law has accepted this assumption even when denying privacy claims. For example, the Court wrote, "Exposure of the self to others in varying degrees is a concomitant of life in a civilized society." *Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967).

215. CATHARINE A. MACKINNON, *TOWARDS A THEORY OF A FEMINIST STATE* 35 (1989); see also C. MACKINNON, *Not a Moral Issue*, in *FEMINISM UNMODIFIED*, *supra* note 107, at 146, 155 (arguing that so-called privacy rights basically amount to the rights of men to "inflict pornography upon women in private").

view that "the realm of personal experience, the 'private' which has always been trivialized, particularly for women, is an appropriate and important subject of public inquiry, and that the 'private' and 'public' worlds are inextricably linked."²¹⁶ According to these theories, the concept of "privacy" possesses little intrinsic meaning. Nonetheless, it tyrannizes society by employing legal rubrics (e.g., the ubiquitous state action doctrine) to refuse to alter or even examine our perceptions and practices in so-called "private" areas.

The second group of critics, in contrast, are unwilling to abandon conceptions of "privacy." They have sought to reformulate "privacy" within different conceptions of "self" and "society." They perceive as impossible the establishment of a universal "person" or "private." A "person" may be "something like a corporation of context-dependent characters";²¹⁷ alternatively, a "person" may be "fundamentally oriented toward and dependent on other people."²¹⁸ One author, responding to an individual-centered conception of privacy, writes:

This self-perception in terms of one's own isolation, of the invisible wall dividing one's own "inner" self from all the people and things "outside" takes on for a large number of people in the course of the modern age the same immediate force of conviction that the movement of the sun around an earth situated at the center of the cosmos possessed in the Middle Ages. Like the geocentric picture of the physical universe earlier, the egocentric image of the social universe is certainly capable of being conquered by a more realistic, if emotionally less appealing picture.²¹⁹

This relationship-based notion of privacy also incorporates those understandings which acknowledge that, for many, "family" is not limited to the living. Intangible bonds or obligations that particular family members or friends feel toward the dead, or toward the reputation of the dead, may comprise a part of the personhood or self of those individual family members or friends.²²⁰

216. Schneider, *supra* note 210, at 602. Experiences such as sexual harassment, battery of women, and child abuse, formerly considered "private" experiences, are now considered worthy of public concern. See *id.* at 624-26, 643 (sexual harassment specifically); see also *Lesbians, Gays and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument—A Symposium*, 10 WOMENS' RTS. L. REP. 107, 114-16 (1988) (recalling that battery used to be "gossip"). But see A. ALLEN, *supra* note 204, at 54-81 (arguing that women should attempt to obtain additional and more meaningful privacy).

217. Ferdinand Schoeman, *Privacy and Intimate Information*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 403, 409; see also Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 962-65 (1982).

218. NORBERT ELIAS, *THE HISTORY OF MANNERS* 261 (E. Jephcott trans. 1978); see also *id.* at 248-49 (suggesting that the vision of an isolated self reflects a particular stage of cultural development).

219. *Id.* at 260.

220. See Radin, *supra* note 217, at 963-64; see also Partridge, *supra* note 85 (arguing that a moral personality exists which "transcend[s] the time and place of its own biological life span," *id.* at 254, and that the living respect this personality in order to assure themselves the continuation of this moral community, *id.* at 261). Some religions also teach that the person does not die with the body but continues to exist in an altered form.

Privacy, then, is not pre-political, but rather "created and bestowed" by society.²²¹ Consequently, private spaces differ across different societies and cultures.²²² For example, the upperclass Athenian woman imprisoned in her house may have suffered the "loneliness of no privacy, and no freely chosen friends."²²³ The ancient Hebrews perceived sexual behavior as subject to the concerns of God and the community.²²⁴ Privacy, if a "panhuman trait," has been circumscribed and defined by societies.

Privacy, in this view, becomes "regard for another's fragile, mysterious autonomy."²²⁵ It protects self-determination, rather than simply offering a "mere right to be let alone."²²⁶ Envisioning privacy this way suggests that a right to privacy requires not isolation, but respect for personhood.²²⁷ Privacy can be maintained despite revelations about an individual if the receiver seeks to understand that the information matters deeply to that individual.²²⁸ Privacy requires an attitude towards the person that recognizes that person's essential humanity.²²⁹

Effect on biography. The legal assumption that privacy involves inaccessibility or a separation of self from society sneaks into fair use analysis, adding weight to judges' and even biographers' decisions that some material

221. R. HIXSON, *supra* note 197, at xiv; see also *id.* at 90-132 (emphasizing a community-based theory of privacy over one based on an individual inherent right); BARRINGTON MOORE, JR., *PRIVACY: STUDIES IN SOCIAL AND CULTURAL HISTORY* 74-76, 274-80 (1984) (surveying understandings of privacy in different societies, including nonliterate, ancient Hebrew, and Greek cultures); Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989) ("right to privacy exists because democracy must impose limits on the extent of control and direction that the state exercises over the day-to-day conduct of individual lives").

222. See B. MOORE, *supra* note 221.

223. *Id.* at 166.

224. See *id.* at 206-16.

225. Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 432 (1987).

226. Rhonda Copelon, *Unpacking Patriarchy: Reproduction, Sexuality, Originalism and Constitutional Change*, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 303, 318-19 (J. Lobel ed. 1988).

227. See L. TRIBE, *supra* note 93, §§ 15-2 to -4, at 1304-14. Tribe advocates a "personhood" approach to constitutional privacy law:

the conviction that, even though one's identity is constantly and profoundly shaped by the rewards and penalties, the exhortations and scarcities and constraints of one's social environment, the "personhood" resulting from this process is sufficiently "one's own" to be deemed fundamental in conformation with the one entity that retains a monopoly over legitimate violence—the government.

Id. § 15-2, at 1305-06; see also A. ALLEN, *supra* note 204, at 43-48 (discussing "personhood" accounts of privacy, noting that "[t]o give a complete account of privacy's moral value, it is necessary to consider the social character of human existence," *id.* at 48).

228. Others have argued that privacy relates to personhood, see Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 300, 310-14; to the ability to enter relationships, see Robert S. Gerstein, *Intimacy and Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 265; James Rachels, *Why Privacy is Important*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 290, 292-97; and to the respect accorded others, see Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 223; Charles Fried, *Privacy*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY, *supra* note 196, at 203. Some of these authors would argue that certain absolute rights of privacy are necessary to assure respect.

229. Schoeman, *supra* note 217, at 406-09.

falls far outside the ambit of fair use.²³⁰ Judge Leval wrote, "If the protected document is highly personal, private and intimate . . . if the public interest in the content is minimal and voyeuristic at best . . . , those might well be factors disfavoring a finding of fair use."²³¹ And even before a judge faces the decision, a biographer, aware of judicial and general public acceptance of an inaccessibility entitlement inherent in privacy, may refrain from including borderline material. Moreover, the narrow fair use defense for unpublished materials places in the hands of the copyright holder the power to deny permission to a biographer based on these privacy concerns.

Biography at times seems to revolve around the question "[h]ow much should a biographer tell?"²³² James Clifford writes, "It is all very well to describe a man's bad temper, or his silly foibles, or to point out that occasionally he drank too much, but what about secret love affairs, illegitimate children, or the subject's syphilis?"²³³ Or consider a biographer's choice whether to omit, mention, or discuss a lesbian or homosexual relationship. A reviewer of Elizabeth Bishop's biography remarked that the book "is not without its hagiographic aspects. . . . [M]ore strangely, [Bishop's] lesbianism is . . . played down. Quite apart from questions of prudery, it is hard to believe that Bishop's sexuality has no relation to her poetry."²³⁴ Should a biographer include material which suggests that the subject held anti-Semitic or racist views, and, if she or he does, what conclusions should the biographer draw? The controversy over H.L. Mencken's diary raised this issue. Some believe that the passages revealed reprehensible personal opinions.²³⁵ Others feel that such views represented broader cultural currents for which individuals should not wholeheartedly be condemned.²³⁶ Finally, should a biographer of a male subject reveal every woman with whom the subject was ever involved?²³⁷ The biographer's answer to these questions determines the

230. The recent development of the narrow fair use privilege for unpublished materials does not permit me to elucidate numerous cases in which judges have considered privacy concerns under the rubric of fair use. The effect of the legal privacy assumption, therefore, is somewhat hypothetical. I base my analysis on the premise that the law will strengthen current social prohibitions on biographers' freedom to shape their depiction of the subject.

231. *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1505 (S.D.N.Y. 1988).

232. J. CLIFFORD, *supra* note 126, at 120.

233. *Id.*; see also *id.* at 113-33.

234. See Katha Pollitt, *Her Friends Were Everything*, N.Y. Times, Jan. 14, 1990, § 7 (Book Review), at 3, col. 3 (reviewing DAVID KALSTONE, *BECOMING A POET: ELIZABETH BISHOP WITH MARIANNE MOORE AND ROBERT LOWELL* (R. Hemenway ed. 1989)).

235. Sheldon L. Richman, *Mr. Mencken and the Jews*, 59 AM. SCHOLAR 407, 408 (1990) (rebutting "damning" charges that Mencken was an anti-Semite).

236. Russell Baker, *Prejudices Without the Mask*, N.Y. Times, Dec. 13, 1989, at A31, col. 1 ("[i]n that setting, southwest Baltimore in the 1930's and 1940's, we were all racists and anti-Semites, and much more that now seems just as unsavory"); see Gwinn Owens, *Mencken—Getting a Bum Rap?*, N.Y. Times, Dec. 13, 1989, at A31, cols. 2-5 (arguing that "today's readers are unaware how commonplace racial slurs and stereotypes were in the 20's and 30's"); see also Richard Bernstein, *After Death, a Writer Is Accused of Anti-Semitism*, N.Y. Times, Nov. 6, 1989, at C17, cols. 1-2 (discussing Brendan Gill's accusation that Joseph Campbell was an anti-Semite).

237. Elizabeth Longford included the names of the 38 of Wilfrid Scawen Blunt's lovers. See Elizabeth Longford, *Wilfrid Scawen Blunt*, in *THE CRAFT OF LITERARY BIOGRAPHY*, *supra* note 189, at 55, 64. Longford withheld the names of married women with children, but she was more

way in which the reader will view history. The constraint placed on the biographer by the law's limiting vision of privacy suggests that she or he will play it safe. Secret love affairs, lesbian relationships, alcoholism, racism, when revealed only through unpublished documents, may as well have never occurred or existed.²³⁸

The legal individualist assumption of privacy appears to give some deference to the expressed intent of the subject. That is, if a subject implies some aspect of her or his life was "private," judges and biographers should agree. Such a construction, however, might sweep wide enough as to preclude any author who had ever indicated a dislike of biography regardless of possible qualifications. Moreover, a subject's expressed intention could be privileged despite cultural and social changes undercutting the rationale for the subject's concern. For example, Mrs. Gaskell omitted from her biography of Charlotte Brontë, the novelist's "hopeless infatuation" with Constantin Heeger out of concern for Brontë's husband, and in deference to "the Victorian notions of propriety which would not allow even an unconscious attraction between a young single woman and her married schoolmaster."²³⁹ Or the law may ignore the complex motivations of subjects such as Beckett:

More than this, [Beckett] saw besmirchment as the human condition. What right had he to except himself from it? Might not his claim to privacy be the last rag of egotism? After all; he himself once printed in a story some sentences from a woman's letter to him, and having violated another's privacy he could scarcely be hoity-toity about his own.²⁴⁰

Furthermore, the individualist, inward-looking assumption may operate to bar biographies of persons, particularly women, because society has traditionally considered their lives "private."²⁴¹ To write of "the wives, daughters, sisters, mothers and lovers of people who did do things that made them famous" is difficult, for "their lives were private; their achievements—chil-

concerned with the effect the list would have on Blount's poetical reputation than with the effect on the women or children.

238. Some writers' disdain for biography, especially biography in which they are the subject, is legendary. Oscar Wilde said, "'Every great man has his disciples . . . and it is usually Judas who writes the biography.'" R. ELLMANN, *supra* note 10, at 1. Wilde also noted that "'biography adds to death a new terror.'" R. ELLMANN, *Freud and Literary Biography*, in A LONG THE RIVERRUN, *supra* note 124, at 259. Thomas Carlyle believed that "'the biographies of men of letters are for the most part the saddest chapter in the history of the human race except Newgate Calendar.'" *Id.* at 259-60. And George Eliot called biography "a disease of English literature." Edel, *supra* note 173, at 21. Hypocrisy in this area, however, is also legendary. For example, Auden disliked biography except when the subject was "absolutely fascinating." Henry James detested the idea of a biography about himself but read and wrote many others. See Marc Pachter, *The Biographer Himself: An Introduction*, in TELLING LIVES, *supra* note 125, at 3, 7.

239. Katherine Frank, *The Brontë Biographers: Romance, Reality, and Revision*, 2 BIOGRAPHY 141, 143 (1979) (discussing MRS. GASKELL, *LIFE OF CHARLOTTE BRONTË* (1857)). Brontë's feelings were known in 1913 when the letters were published.

240. R. ELLMANN, *The Life of Sir Botchit*, in A LONG THE RIVERRUN, *supra* note 124, at 229, 231.

241. Cf. Manganyi, *supra* note 18, at 52 (discussing possibility of a history of writing of victims of apartheid); Stephen W. Sears, N.Y. Times, Jan. 14, 1990, § 7 (Book Review), at 8, col. 1 (reviewing JOSEPH T. GLATTHAER, *FORGED IN BATTLE: THE CIVIL WAR ALLIANCE OF BLACK SOLDIERS AND WHITE OFFICERS* (1989)).

dren, good homes, ripe peaches, warm quilts—were not the stuff of history.”²⁴² After finding in “formerly neglected sources”²⁴³ unpublished materials by the semiprivate, the unknown, obscure, and disenfranchised, the biographer must decide whether to use them. Quoting the material may be risky. A court, applying fair use analysis and an inward-looking idea of privacy, may not perceive that judging these quotations “private” and prohibited by copyright creates a self-fulfilling prophecy. Until such lines appear in public “history,” the law’s categorization will continue to find them “private.”

Beyond restricting the biographer’s choice of subjects and their proclivities, the legal conception of privacy also affects the biographer’s access to materials.²⁴⁴ The family and friends of a subject, citing traditional access-based privacy notions, can refuse to give access to material in their own holdings²⁴⁵ or in library collections.²⁴⁶ Joyce destroyed letters between Sa-

242. Strouse, *supra* note 177, at 114, 118-19. See Deborah Kaplan, *The Disappearance of the Woman Writer: Jane Austen and Her Biographers*, 7 PROSE STUD. 129, 145 (1984):

By considering both her public and her private writings, we can consider the relations between general and woman’s culture. . . . Patriarchy has dominated Anglo-American culture and hence its biographies, but that hegemony is now under attack. . . . We can challenge biography’s patriarchal reconstructions of the past with the histories of women writers like Jane Austen.

243. Lerner, *supra* note 117, at 109.

244. For a discussion of whether there is a “right to biography,” see LOIS G. FORER, A CHILLING EFFECT: THE MOUNTING THREAT OF LIBEL AND INVASION OF PRIVACY ACTIONS TO THE FIRST AMENDMENT 208-34 (1987) (asking “To Whom Does a Life Belong?”).

245. See C.D. BOWEN, *supra* note 132, at 64 (noting biographers were barred access to family papers including those of Bernard DeVoto and Mark Twain); J. GARRATY, *supra* note 19, at 170-72. Of course, not all families have the same “philosophy of privacy.” Ann Hulbert, *Washington Diarist—Keep Out*, NEW REPUBLIC, Nov. 14, 1988. Hulbert contrasts Stephen Joyce’s destruction of his letters from James Joyce’s daughter, Lucia, and Benjamin Cheever’s statement in the introduction to *The Letters of John Cheever* “that for my father, orgasm was always accompanied by a vision of sunshine, or flowers.” *Id.*; cf. Phyllis Auty, *Problems of Writing a Biography of a Communist Leader* in NEW DIRECTIONS IN BIOGRAPHY, *supra* note 18, at 26-40 (discussing the problem faced by biographers writing on communist leaders when the party limits access to perpetuate a particular image of the leader).

246. Biographers usually gain access to materials at libraries only after signing contractual agreements, often restricting their ability to cite original materials. Such restrictions mirror legal requirements, requiring permission of the copyright holder. For example, the application to examine manuscripts in Houghton Library at Harvard University states that examination

does not include permission to publish the contents of the manuscript or any excerpt therefrom . . . and that separate written application for permission to publish in any form, or to quote in a dissertation, must be made to the librarian . . . I agree to abide by his decision. The library makes no representation that it is the owner of the common law copyright or literary property in any unpublished manuscript, and that permission to publish must also be obtained from the owner of the copyright (the author or his transferees, heirs, legatees, or literary executors).

A typical letter to a biographer states,

In so far, and only in so far, as the rights of this library extend, I am glad to give you permission to quote from . . . [the letters] in the manner outlined The library can only claim physical ownership of the manuscript in question, and it is impossible for us to determine the identity of possible claimants of literary property. Responsibility for identifying and satisfying any such claimants must be assumed by users wishing to publish the material.

Interview with Rodney Dennis, *supra* note 176. See G. PETERSON & T.H. PETERSON, *supra* note 176, at 38-40, 42, 53-55.

muel Beckett and Lucia, stating that "no one was going to set their eyes on them and psychoanalyze my poor aunt."²⁴⁷ Or they may grant access, but subject to their approval of the final product. For example, Stephen Joyce "obtained the deletion of an epilogue by threatening to withhold permission to quote from other material throughout the book, such as 'a perfectly innocuous' letter from James Joyce to his patron, Harriet Shaw Weaver."²⁴⁸ These fair use-based methods of protecting privacy probably will be more successful than state common law or statutory privacy actions.²⁴⁹ And if the family can get to court, privacy concerns may motivate a judge in a copyright case to defer to the plaintiff. With certain individuals, privacy concerns may simply make writing some biographies, or aspects of them, quite risky.²⁵⁰

To avoid potential litigation, the biographer will explore only a subject's traditional public life—the commonly accepted area of accessibility. Venturing into aspects which the law assumes are "private" will be too difficult. The biographer cannot quote any material from the "private" to support a complex or contested interpretation. Moreover, without quotation as a "factual" basis, a biographer's conclusions concerning activities the law considers "private" will appear frivolous, unscholarly, and idle speculation. Biography whose subjects lived in the distant past will focus on men, mostly white; biography whose subjects lived in the recent past, will tell little of the subjects' life and relationships that might bear on friends and family that remain alive. Perhaps most significantly, biography will reinforce the legal conception of humans as individuals whose actions in the private sphere can be isolated and should be ignored.

III. THE LITERARY THEORY OF BIOGRAPHY

I have explained that copyright and privacy doctrine, although aimed at the seemingly narrow issue of how and under what circumstances one can use unpublished documents, encourages a specific form of biography. Sharing the assumptions encoded in the relevant law, biographies suggest to their readers that "facts" possess objective truth, that an author's intent is easily

247. James, *supra* note 59, at C13, C16, col. 1.

248. *Id.* at 16, col. 5.

249. The Rosenbergs' children brought a privacy action in *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973), 381 F. Supp. 29 (S.D.N.Y. 1974), *dismissed*, 417 F. Supp. 1205 (S.D.N.Y. 1976). State law privacy actions also failed in *Rosemont Enters. v. Random House, Inc.*, 58 Misc. 2d 1, 294 N.Y.S.2d 122 (Sup. Ct. 1968) (holding that a public figure has no right under New York privacy statute to suppress truthful accounts of life), and in *Koussevitzky v. Allen, Towne & Heath*, 188 Misc. 479, 68 N.Y.S.2d 779, 783, (Sup. Ct. 1947) ("The right of privacy statute does not apply to an unauthorized biography of a public figure unless the biography is fictional or novelized in character That it may contain untrue statements does not transform it into a class of fiction.")

Occasionally, privacy actions succeed. See P.N. ACTON, *supra* note 85 (discussion of successful privacy action against author by living subject).

250. Before confronting legal problems, Hamilton had decided to write only of Salinger's life before he secluded himself—in other words, the time during which he arguably was a public figure: "J.D. Salinger was now a public figure. Not *very* public yet, but public enough for him to be talked about by a lot of people he had never met, to have an identity in many others' mind that was outside his immediate control." I. HAMILTON, *supra* note 45, at 111.

discernable and highly relevant, and that privacy not only exists as an ascertainable concept, but looks inward, concerning itself with individual inaccessibility. Some may be satisfied with this type of biography. But should we be? The stories we tell about ourselves promote certain visions. If we want to imagine a world of different possibilities, the way in which we describe ourselves may be a good place to begin.²⁵¹ Perhaps the current legal assumptions exclude too much. Others would let us tell different stories. If I believed, as some critics do, that we could constantly revise these assumptions, a moment's decision to create legal doctrine as it currently exists would not bar future change.²⁵² But I fear that the law, by recreating a biography in its own image, silences a crucial area of human self-exploration. Yeats predicted, "We may come to think that nothing exists but a stream of souls, that all knowledge is biography."²⁵³ The law may dam our understandings in a manmade mud hole.

The causal relation between law and biography may be as much circular as one-way. The evolution of legal choices in the areas of copyright and privacy law was no doubt affected by traditional canons of biographical craft—canons which sought to reveal objective truth in history, believed that the intent of a subject was easily discerned, and, perhaps, limited inquiry to certain "respectable" questions.²⁵⁴ The stories such biographers tell have had, and should continue to have, a part in defining our historical consciousness. Indeed, traditional biographies strive to describe the diversity of human experience.²⁵⁵

But the variety of current biographies does not contradict my earlier contention that traditional biographies, as a genre, lack the capacity to provoke the reader to reconsider our understanding of history, culture, and society. The legal assumptions discussed above seep into biography in subtle ways—and randomly pulling a biography off the shelf may fail to convince anyone of the need for legal change.

Hence I describe a normative theory of biography.²⁵⁶ Quite frankly, it would be frustrating, if not, perhaps, quite unpleasant, to read a biography fulfilling every characteristic of normative biography, even assuming that an author would write one. I nevertheless use the idea of normative biography to sketch a model: a super self-conscious, continually self-checking, critically self-analytic biography that forces the reader to proceed in a conscious,

251. See Gordon, *supra* note 66.

252. Cf. ROBERTO MANGEBEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1983).

253. L. EDEL, *supra* note 10, at 20 (quoting W.B. Yeats).

254. See text accompanying note 239 *supra* (discussing biographer Mrs. Gaskell's omission of Charlotte Brontë's infatuation because of Victorian morality).

255. See, e.g., R. GITTINGS, *supra* note 7, at 92-93 ("we seem to have arrived at a notable point when present life itself is enlarged and enriched by what we read about past lives"); P. M. KENDALL, *supra* note 7, at 126.

256. My idea of normative biography is one of imagined types. Recall Michelangelo's "slaves"—nudes emerging from marble blocks. The blocks with their partially carved rockladen figures represent traditional biography, but the vision we form in our minds of the bodies unencumbered by marble, parallels normative biography.

critical fashion. Such a biography would promote a reflective impulse and creates space for society to reconsider its beliefs about itself. Legal doctrines that hinder the normative biography necessarily hinder less provocative visions. Our task is to recreate our legal understandings to facilitate the "knowledge of how other people have given shape to their lives, knowledge of other ages and cultures, knowledge of the conditions of freedom and fate" ²⁵⁷

In this section, I first sketch the idea of normative biography by recognizing four essential problems of biography. I then discuss how normative biography, like traditional biography, is imperiled by law. In the final section, I analyze three possible legal changes in a search to find a legal understanding that not only will permit, but also will encourage, normative biography.

A. *Normative Biography*

Normative biography derives from criticism of traditional biography. Biography, until recently, received little theoretical attention compared to other forms of writing.²⁵⁸ Recent critics, practitioners, and literary theorists, however, have debated issues such as the precise division between "fact" and interpretation, the degree to which the biographer should appear in the work, the extent to which psychoanalysis provides a useful analytical tool, the amount of freedom the biographer should have over the arrangement and selection of materials, and the boundary delineating insight from trivial gossip.²⁵⁹ Few critics desire definite resolution; their quarrels involve degrees and distinctions. Structuring their perceptions of the boundaries of the debate are what biographical theorist William Epstein calls "generic frames"—understandings of biography that appear to shape our recognition that a piece of writing is "biography."²⁶⁰ Epstein suggests four "frames," essentially four problems confronted by biographers: "recognizing the life-text" (the problem of depicting life from written text); "recognizing the biographical subject" (the problem that a biographer's choice of subject necessarily constructs the biography); "recognizing the biographer" (the problem of biography as the art of interpretation); and, "recognizing the life-course" (the problem of addressing traditional cultural and societal assumptions and conventions of the self).²⁶¹ I employ these four frames to describe a normative biography. Each frame reminds us that biography is not merely a book;

257. James F. Veninga, *Biography: The Self and the Sacred Canopy*, in *THE BIOGRAPHER'S GIFT*, *supra* note 18, at 59, 68.

258. Biographical theorists often begin their discussions with this observation. See, e.g., W. EPSTEIN, *supra* note 4, at 1, 6-11. Commentary on biography tends to fall into four categories: history of biography, how-to-do-biography, personal experience about writing biography, and literary theories. Most writers combine at least two of these categories.

259. See generally D. NOVARR, *supra* note 11 (summarizing theories by a number of biographers and critics).

260. For Epstein's own complex definition of generic frames, see W. EPSTEIN, *supra* note 4, at 2-3.

261. *Id.* at 3. My apologies to William Epstein for reducing his complex literary theory and

it is a process. Biography involves a subject who thinks and then writes, a biographer who reads and then writes, and a reader who reads and then must think.

1. *Recognizing the life-text.*

"Life-text" describes the problem biographers face in, first, constructing a life out of written materials and then recording the construction through written materials. Essentially the problem involves the idea of "fact." "Fact" may have no "special claim to the truth other than that granted to it by biographical recognition."²⁶² In normative biography, biographers understand that they do not just find "fact." They realize that "fact" is a word we give to material that serves particular purposes. Ira Nadel described these purposes as

establish[ing] information, verisimilitude and truthfulness. The first is the simplest: to convey information and detail; the second is the most evocative and representational, generating a mood or atmosphere; the third is the most difficult and perhaps the greatest test of a biographer: establishing a sense of the character and personality of the subject.²⁶³

Hence, various things can serve as "fact." For example, a biographer may use a date to show chronology, or a description or a quote from an author's unpublished writing to show the subject's voice, self-characterization, belief or style.²⁶⁴ Something becomes a "fact" when the biographer decides—by including it in her or his work—to imbue it with the integrity and truth value that society gives to things called "facts." Paul Murray Kendall perceived this aspect of normative biography when he wrote:

It will not do simply to say that biography is made out of fact (whatever that

taking it out of context. In conventionalizing and freezing it, no doubt I transgress the spirit of his methodology.

For alternative typologies, see J. CLIFFORD, *supra* note 126, at 83-89 (dividing biography into objective, scholarly-historical, artistic-scholarly, narrative, and fictional); L. EDEL, *supra* note 10; M. LOMASK, *supra* note 14, at 2-3 (dividing biography into narrative, topical, "and," and essay); I.B. NADEL, *supra* note 119, at 151-82 (suggesting biography based on myth, metaphor, and metonymy); Snipes, *supra* note 129, at 147 n.2 (dividing biography into documentary, narrative, critical, historical, psychological, artistic, and imaginative).

262. W. EPSTEIN, *supra* note 4, at 43. Epstein argues that, by taking life that continues to exist only through texts and transforming it into a text which communicates life (*see id.* at 27, 32), biography establishes an ontological space between the natural and the narratable where the cultural 'facts' of institutional documentation are treated as remnants of the natural events of a concrete life." (*id.* at 33).

263. I.B. NADEL, *supra* note 119, at 11.

264. The ancients always did think of things first. Plutarch wrote, "It must be borne in mind that my purpose is not to write histories, but lives Sometimes . . . an expression or a jest informs us better of their characteristics and inclinations, than the most famous sieges" Marc Pachter, *The Biographer Himself: Introduction*, in TELLING LIVES, *supra* note 125, at 2, 12 (quoting Plutarch's *Life of Alexander*, in PLUTARCH'S LIVES 159 (A.H. Clough trans. 1988)); *see also* J. GARRATY, *supra* note 19, at 11-12 (stating that different biographers will reach different characterizations about the same subject); M. LOMASK, *supra* note 14, at 29-36.

The "style" of the subject—the choice of words, the rhythm of the prose—is an integral part of biography. *See, e.g.,* L. EDEL, *supra* note 10, at 130-31; Paul Mariani, *William Carlos Williams*, in THE CRAFT OF LITERARY BIOGRAPHY, *supra* note 189, at 133, 143; James Walter, *Language and Habits of Thought: Biographical Notes on E.G. Whitlam*, 4 BIOGRAPHY 17, 21-28 (1981).

is) . . . we demand of biography that it be *true to a life* . . . signifying not "factual" but "authentic"—and authenticity lies not only in what we are given but in what we are persuaded to accept.²⁶⁵

When the normative biography recognizes the life-text, it recognizes the tentativeness of "facts." A normative biography may imply certain things are "fact." It may use quotations as "fact" to support an interpretation, to understand "fateful uncertainty,"²⁶⁶ and to reveal an unknown voice or style of the subject. It may document sources and integrate "facts" into the biography and the biographer's interpretation. Nevertheless, the biography seeks not to tell *the* "facts" but to offer the reader an understanding of the subject which deserves to be recognized as possibly true. And the reader, in recognizing the life-text, remains free to reach her or his own conclusions about the validity she or he will give to these "facts."

2. *Recognizing the biographical subject.*

Recognizing the biographical subject involves the awareness that the biographer, through her or his biography, constructs the subject. Epstein writes that "neither antique fame nor distinguished character is a prerequisite for inclusion in the biographical catalogue of the emerging consumer society. On the reading public's behalf biography can now authorize practically anyone (or anything) as a biographical subject."²⁶⁷ While this recognition permits social awareness of "cultural outlaws" and their differences, it also forces their differences into the sameness of the biographical narrative.²⁶⁸ The normative biography seeks to avoid and its reader is wary of such entrapment. In addition, the normative biographer acknowledges decisions about which particular aspects of the subject should be recognized.²⁶⁹ The biographer writes aware "that each life is part of a tissue of confidences which extend to many lives."²⁷⁰ The biographer abandons the simple dichotomy of social and solitary self.

In its place, the normative biographer struggles with a more complex understanding of the subject.²⁷¹ In particular, family interests and the subject's "privacy" hinder the normative biographer. First, at one extreme, a normative biography cannot bow to family interests; hence, it cannot be "authorized." Such a biography would recognize only the subject that the fam-

265. P.M. KENDALL, *supra* note 7, at 8.

266. C.D. BOWEN, *supra* note 132, at 70.

267. W. EPSTEIN, *supra* note 4, at 67.

268. *Id.* at 88.

269. See Linda Simon, Boston Phoenix Literary Section, Nov. 1989, at 8.

270. J. CLIFFORD, *supra* note 126, at 123 (quoting Times Literary Supplement, Apr. 10, 1969, at 388).

271. For example, Cynthia Ozick argues that T.S. Eliot can only be understood by "reading backwards" from biographies about Eliot. Cynthia Ozick, *A Critic at Large: T.S. Eliot at 101*, NEW YORKER, Nov. 20, 1989, at 144. Eliot implied his poetry bore no relation to his life. He claimed to be the most perfect artist—one who separates "[t]he man who suffers and the mind which creates." *Id.* at 123. He argued that examinations of poetry in light of the poet's life were incorrect. The Eliot biographies, however, reveal that his life "decodes" his poems, e.g., explaining oblique references. Despite his protestations, the man and mind were inseparable. *Id.* at 144.

ily wants the world to see or that the family itself sees.²⁷² But at the other extreme, to ignore familial social bonds which formed and continue to form the subject may depict a warped solitary representation.

Second, understanding the subject involves understanding why the subject desired privacy²⁷³ or why she or he rejected²⁷⁴ it. On one hand, normative biographers remain aware of ethical sensibilities; "even our intimacy," as Richard Ellman has written, "shows occasional restraints, little islands of guardedness in a blunt ocean."²⁷⁵ But on the other hand, biographers explore a deeper conception of the subject. For example, Whitman's biographer wrote that "[w]hat is at stake here is not just invasion of privacy but the biographer's obligation to give Whitman himself the freedom he never had to pursue his recognition that love, of whatever sort it may be, was at the root of roots in his life and poetry."²⁷⁶

When the normative biography recognizes the subject, it recognizes that "[b]ecause of historical, social and ultimately stylistic restrictions and inferences, no biography can duplicate the life of its subject."²⁷⁷ A normative biography may make certain assertions about the subject. It may privilege familial interests or it may discuss seemingly "private" incidents. But throughout, the biography remembers that "[b]iography is essentially a demythologizing form. Consistently, it functions to correct, restate or reinterpret false or distorted accounts of the subject"²⁷⁸ "False" indicates a momentary judgment; the normative biography looks forward to its own demise by reinterpretation.²⁷⁹ The reader begins the process by demythologizing the biography's portrayal of the subject and recreating a slightly altered understanding of the subject.

3. *Recognizing the biographer.*

Recognizing the biographer involves abandoning the illusion of objectivity in biography and seeing the literary art in biography. Normative biographers, like some traditional biographers, know they are not objective, not "Almighty God."²⁸⁰ But unlike traditional biographers, normative biographers are read by a reader aware that she or he is reading only "Henri

272. See notes 244-250 *supra*.

273. See, e.g., Mark Holloway, *Norman Douglas*, in *THE CRAFT OF LITERARY BIOGRAPHY*, *supra* note 189, at 89, 91; Deirdre Bair, *Samuel Beckett*, in *THE CRAFT OF LITERARY BIOGRAPHY*, *supra* note 189, at 199, 214; see also Pachter, *supra* note 264, at 5-6; C. D. BOWEN, *supra* note 132, at 111.

274. See text accompanying note 240 *supra* (discussing Beckett).

275. R. ELLMANN, *supra* note 10, at 4.

276. Kaplan, *supra* note 47, at 54.

277. I.B. NADEL, *supra* note 119, at 176-77.

278. *Id.*

279. Cf. Carolyn Heilbrun, *Was there Life After Percy?*, N.Y. Times, Feb. 12, 1989, § 7 (Book Review), at 14, col. 3 (praising EMILY W. SUNSTEIN, *MARY SHELLEY: ROMANCE AND REALITY* (1989): "As biographers of women, we must . . . ignore old reputations and, by means of our revisionary work, become the belated daughters of mothers long dead and long betrayed by history.").

280. Catherine Bowen wrote, "Of course the biographer is biased! All history is written from a point of view and no one but Almighty God could write with pure objectivity." C.D. BOWEN, *supra* note 132, at 92.

Troyat's *Tolstoy*,"²⁸¹ not "*the* life of Tolstoy." The reader perceives that the subject and the biographer "smell[] equally of mortality."²⁸² Subject, biographer, and reader cannot escape the prejudices of race, class, ethnicity, gender, time, place, sexual orientation, and other variables. Normative biography discusses how the subject's perceptions have been influenced by these social and cultural factors. This analysis will raise the hint in the biographer's and reader's mind that the biographer operates under similar clouds. In turn, the reader suspects that she or he also may reach conclusions based on questionable assumptions.

Elucidating and disguising the interpretive practice of biography requires the normative biographer to practice a literary art. Biography is selection, arrangement, interpretation, and description. The use of the subject's writings is integral to this process. If the biographer did not quote, the reader would question the biographer's statements. If the biographer only quoted, the essential creative interpretive practice of biography would vanish. Selective quotation, however, forces the reader to confront the interpretive nature of biography.

When the normative biography recognizes the biographer, it recognizes the fact that biography is interpretation by biographers. The reader serves, in essence, as a second biographer, reinterpreting the story the actual biographer wrote. The normative biography may use quotations and it may make assertions. But by this very practice, which seems to establish convincing authority, the normative biography encourages the reader to criticize and doubt the "truth" of the biographer's interpretation.

4. *Recognizing the life-course.*

Recognizing the life-course involves questioning the traditional vision of the self. The life-course of the subject, as the history of biography shows, generally has been depicted as linear: birth to death, accompanied by symbolic moments of insight, in a rational outline of development.²⁸³ The normative biographer abandons the "myth of personal coherence."²⁸⁴ She or he realizes that a life is a story only because the biographer tells it as one;²⁸⁵ a subject's self exists in unity only because the biographer describes it as such. Instead, the normative biographer accepts "that we are self-contradicting and ambivalent, that life is neither as consistent nor as intellectual as biogra-

281. Simon, *supra* note 269, at 8, col. 2; see also I.B. NADEL, *supra* note 119, at 189; L. EDEL, *supra* note 10, at 43.

282. R. ELLMANN, *supra* note 124, at 261.

283. See W. EPSTEIN, *supra* note 4, at 138-39.

284. James Clifford, "*Hanging Up Looking Glasses at Odd Corners*": *Ethnobiographical Prospects*, in *STUDIES IN BIOGRAPHY*, *supra* note 177, at 41, 44. Clifford writes: "A person . . . is a sequence of culturally patterned relationships, a forever incomplete complex of occasions to which a name has been affixed, a permeable body composed and decomposed through continual relations of participation and opposition." *Id.* at 53-54; see R. ELLMANN, *supra* note 124, at 264-65.

285. See *Introduction*, in LOUIS O. MINK: *HISTORICAL UNDERSTANDING*, *supra* note 117, at 1, 19-20 n.17. Cynthia Ozick has argued that biography's appeal is its attempt to show that life is a teleology. Cynthia Ozick, *Where Orphans Can Still Become Heiresses*, N.Y. Times, Mar. 8, 1987, § 7 (Book Review), at 13, col. 3.

phy would have it be"²⁸⁶ Even the judgment that some lives are "failures" and others "successes" is recognized as the product of traditional cultural and societal assumptions and conventions of the self.²⁸⁷ When the normative biographer claims a course for the subject, she or he also realizes the transience of the claim. The reader then will realize it also, feeling free to find partial triumph where the biographer saw only disaster. When the normative biography recognizes the life-course, it recognizes that the life and self displayed, in the subject's own writings and the biography itself, take form from the particular writer. Thus, the life-course of the subject in a normative biography may begin before birth and end after death. It may move with authorial expectations or against them. It may trickle through years of nothingness or plunge through seconds of glory. It may touch and possess others or it may retreat alone.

Whatever the particular version of the life-course, the recognition of its mutability reinforces the overarching recognition of normative biography: no definitive answers or mandates can be found or proposed, for biography demands questions and decisions by biographer and reader. Normative biography seeks not to solve the problems revealed in each frame. Instead, it resolves never to forget that these tensions are the very essence of biography.

C. *The Normative Biography and the Law*

In a bounded world, one biographer noted, biography is circumscribed by history to the north, fiction to the south, obituary to the east, and tedium to the west.²⁸⁸ Copyright law's control over the fifty years following an author's death further binds biography. As demonstrated above, legal doctrines show little patience with traditional biography. Moreover, they do not tolerate normative biography. Consider the four problems with which normative biography struggles. The law—in particular copyright and privacy law—denies their existence.

First, normative biography's exploration of the "life-text" and the "biographer" revolves around an understanding that "fact" is not found. Aware that "fact" symbolizes the interpretation which the reader attributes to the so-called "fact" material, normative biography uses quotation as fact. By juxtaposing quotations and the biographer's interpretation, normative biography forces the reader to confront the inherent ambiguity of "fact." The law's fact/expression dichotomy and its assumption of objectivity prohibit this understanding. Intuitive judicial division of fact and expression bars "fact" as a fluid concept. The presumption that a quotation is "expression" bars the use of quotation as fact. The objectivity assumption bars the interpretive refrain of normative biography.

286. L. EDEL, *supra* note 10, at 108.

287. See Phyllis Frus McCord, "A Spectre Viewed by a Specter": *Autobiography in Biography*, 9 BIOGRAPHY 219, 221 (1986).

288. Daniel J. Boorstin, *Welcome*, in BIOGRAPHY & BOOKS 12 (J. Cole ed. 1986) (quoting Philip Guedella).

Second, normative biography's approach to the "subject" and the "life course" reveals the difficulty of establishing intent to publish. Caught between family perceptions and the written remnants of the subject, normative biography hesitates to construct a simple or clear depiction. Normative biography does not accept the face value of the subject's words. It seeks to place them within the context of the subject's numerous human connections and cultural influences. Moreover, it realizes that the life course does not cease with the subject's death but encompasses the biographer's and reader's lives—the subject only "lives" through the living reader. But the law assumes that "unpublished" indicates a choice not to publish, ignoring this complexity. It blocks normative biography's attempt to indicate the ambiguity of intent through quotation and interpretation. It silences normative biography's caveat: biography is and is only interpretive—our determination of the subject's "intent" reveals, in part, our perceptions, our "intent."

Third, normative biography's search for the "subject," the "biographer," and the "life-course" indicates the interwoven nature of present lives and past history. Normative biography proposes that lives gather meaning from their accessibility, their connectedness to other lives. The legal idea of privacy, premised on inaccessibility, refuses to credit such a notion. In a clumsy attempt to protect the subject's life, the law condemns the subject to perpetual death. It refuses normative biography's offer of cautious and respectful resuscitation.

The law does not permit normative biography. The three legal assumptions—objectivity, discoverable intent, and individual identity—are the antithesis of normative biography. Most importantly, the law fails to recognize the essence of normative biography: a perpetual, self critical, and reinterpretive investigation of our history.

IV. RECOGNIZING NORMATIVE BIOGRAPHY

But can any legal doctrine recognize and facilitate normative biography? I sketch three conceivable solutions, hoping more to provoke the reader's mind than to offer a definitive answer.

A. *Anything Goes*

As a first solution, the law could eliminate the fact/expression dichotomy, effectively ending the copyright monopoly. This solution would rid the law of problematic assumptions underlying the dichotomy, assumptions underlying fair use, and privacy concerns operating within copyright law. I suspect this solution would never be adopted by legislatures or accepted by courts.

Obliterating the fact/expression dichotomy probably would prove unworkable. Wed to a system permitting exclusive individual ownership of writing, our legal system would most likely replace this dichotomy with another designed to balance between the desire for publicly-held "facts" and the necessity to stimulate investment in those facts by protecting creative

"expression." Moreover, assuming nothing appeared to replace the fact/expression dichotomy, this biographer's fantasy would, in effect, be an archivist's (and future biographer's) nightmare. Regardless of the "validity" of inward-looking conceptions of "privacy," people do have some sort of privacy concerns. Potential subjects, fearing uninhibited, malicious, and careless use of their darkest secrets, would protect themselves through pre-death conflagrations. Biography, at least written biography, would become impossible.

B. *Enhanced Fair Use*

As a second solution, the law could retain the fact/expression dichotomy, but permit enhanced fair use for users of unpublished expression and restrict the applicability of privacy concerns in copyright actions. Motivated by the *New Era* controversy, recent commentators and the congressional legislation have suggested variations on this idea. I have selected four representative proposed solutions—those offered by Judge Pierre N. Leval, Judge Roger J. Miner, and Professor Lloyd L. Weinreb, as well as the language of H.R. 4263.

1. *Judge Leval*.

Like many critics, Judge Leval²⁸⁹ would allow fair use for unpublished materials if the use preserves the "utilitarian purpose" of copyright.²⁹⁰ But in addition to "permitting authors to reap the rewards of their creative efforts" to "stimulate activity and progress in the arts for the intellectual enrichment of the public,"²⁹¹ Judge Leval would justify fair use by a secondary author where that use is "transformative."²⁹² Use is "transformative" if "the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings . . ."²⁹³ Transformative uses include "criticizing the quoted work, exposing the character of the original author, proving a fact . . ."²⁹⁴ Judge Leval would retain some special status for unpublished material, particularly if the material is "created for or is on its way to publication."²⁹⁵ He would not, however, "read protection of privacy into copyright" law.²⁹⁶

At first glance, this approach appears to reach results that normative biographers might desire—an expanded fair use privilege seemingly focused

289. Judge Leval tried *Salinger v. Random House, Inc.*, 650 F. Supp. 413 (S.D.N.Y. 1986), *rev'd*, 811 F.2d 90 (2d Cir.), *cert. denied*, 484 U.S. 890 (1987); *Craft v. Kobler*, 667 F. Supp. 120 (S.D.N.Y. 1987); and *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493 (S.D.N.Y. 1988), *aff'd*, 873 F.2d 576 (2d Cir.), *reh'g en banc denied*, 884 F.2d 659 (2d Cir. 1989), *cert. denied*, 110 S.Ct. 1168 (1990).

290. Leval, *supra* note 19, at 1108.

291. *Id.* at 1107.

292. *Id.* at 1111.

293. *Id.*

294. *Id.*

295. *Id.* at 1118-22.

296. *Id.* at 1129.

on a biographer's use of material. Judge Leval's assumptions, however, like those of the current law, shackle normative biography. Judge Leval does not embrace the transitory quality of "fact." His analysis focuses on fair use, presuming that quotations must be expression. More importantly, although Judge Leval hesitates to serve as literary critic,²⁹⁷ his analysis replaces readers as critics with judges as critics. For example, he would allow the use of quotations to prove a biographer's conclusion,²⁹⁸ but not to "enliven" the text of the biography.²⁹⁹ The distinction reveals some recognition that in normative biography, quotation can constitute fact. Judge Leval's "enlivening" standard, however, is conclusory.³⁰⁰ It amounts to the judge's decision that the quotation did not support the conclusion. Quotations which are used to reveal the subject's unpublished voice, to show her or his writing style, or to demonstrate ambiguity in the original material will be particularly endangered by an "enlivening" test. Moreover, the "enlivening" standard suggests that if the original author is pedantic, boring, and obscure, the biographer can appropriate more material. Judge Leval's assumption that so-called "professional" authors as biographers' subjects differ from other writers also appears in his focus on publication intent, and the notion runs counter to normative biography's complex vision of intent.³⁰¹ Under Judge Leval's solution, the right to use unpublished expression is inversely proportional to the perceived place of the writer in the literary canon. His belief that literary subjects should receive greater and different protection from other biographical subjects ignores normative biography's ability to "rescue" subjects from the ignominy of historical judgment. His solution removes the reader from the process of normative biography and substitutes the judge.

2. Judge Miner.

Judge Miner finds it particularly discomfoting that "judges, rather than literary critics, should decide whether literary material is used to enliven text or demonstrate truth."³⁰² He advocates, instead, expanding fair use beyond published materials to include "publicly disseminated materials."³⁰³ Such materials would include "any letters sent without a requirement of confiden-

297. See *New Era*, 695 F. Supp. at 1506 (arguing that "[i]t is an uncomfortable role for courts [evaluating the purpose and character of the use] to serve as literary critics We judges generally lack both competence and the necessary information to form such opinions").

298. Leval, *supra* note 19, at 1113-14, 1116; see *New Era*, 695 F. Supp. at 1508-19.

299. *New Era*, 695 F. Supp. at 1504, 1507, 1524; see Leval, *supra* note 19, at 1112. Leval's "enlivening/transformation" dichotomy appears to have grown out of his acknowledgment in *New Era* that Ian Hamilton, author of the Salinger biography, had unjustly appropriated Salinger's words to avoid writing a "pedestrian" sentence. *Id.* at 1113.

300. See Lloyd L. Weinreb, *Fair's Fair: A Comment on the Fair Use Doctrine*, 103 HARV. L. REV. 1137, 1142-43 (1990) (suggesting that despite Leval's contrary protestation, Leval's test would justify his holding in *Salinger* as well as his holding in *New Era* because "without precise quotations, a reader of the Salinger biography is unable to see for himself whether the biographer's characterization of the letters is accurate").

301. Leval, *supra* note 19, at 1120.

302. Miner, *supra* note 57, at 6 (referring to his *New Era* en banc denial opinions, 884 F.2d at 661).

303. *Hearings*, *supra* note 6, at 3 (statement of Judge Miner).

tiality and any documents, including letters, that have been in existence for a certain period of years without having been copyrighted.”³⁰⁴ Judge Miner would bar the use of all other “unpublished” materials.³⁰⁵

Judge Miner’s suggestion recognizes that the “unpublished” rubric may winnow out as chaff, documents for secondary quotation that normative biography suggests the author would have permitted biographers to use. Unfortunately, Judge Miner would leave little grain for biographers. His proposal prohibits quotations from diaries, personal notations, and other documents which, by their nature, are not sent to others. As Ralph Oman indicates, the proposal would not permit quotation from “voluntarily undis-seminated works whose contents are of great public interest.”³⁰⁶ Judge Miner’s conception of intent, though broader than that adopted by legal doctrine, ignores normative biography’s protestations of the interpretive nature of the judgment. Were Judge Miner’s proposal to become the law, even Hallmark thank-you notes—which may reveal the subtle motivations of a subject—would have a “requirement of confidentiality:” the blanket statement “For Your Eyes Only” embossed across the top.

3. *Professor Weinreb.*

Professor Weinreb’s proposed solution emphasizes the “fairness” aspect of fair use.³⁰⁷ He states that “[w]hat is fair is . . . fact-specific and resistant to generalization.”³⁰⁸ Rejecting the narrow utilitarian focus of Judge Leval, Professor Weinreb seeks to expand the fair use inquiry beyond the four statutory factors³⁰⁹ to include an examination of the ordinary or customary practices and public expectations of biographers.³¹⁰

I agree with Professor Weinreb’s proposal to the extent that it favors context-specific decisions. Normative biography highlights the uniqueness of each biographical process. Nevertheless, the standard remains vague.³¹¹ Weinreb argues that a context-specific “fairness” test would be relatively easy to apply because “fairness has more, and more widely accepted, meaning” than context-specific standards applied in other areas of the law.³¹² But Professor Weinreb’s apparent substitution of the public as literary critic does not avoid the judge-as-literary-critic problem. He has not adopted norma-

304. *Id.* at 4. The 1976 Act grants copyright from the moment of a work’s fixation. 17 U.S.C. § 102(a) (1988). I assume that Judge Miner intends this provision to permit the use of materials found, for example, 125 years after creation, without the possibility that an heir could bar their use by claiming copyright protection.

305. Miner, *supra* note 57, at 9.

306. *Hearings*, *supra* note 6, at 65.

307. Weinreb, *supra* note 300, at 1138 (“[f]air use has historically been and ought to remain what its name suggests: an exemption from copyright infringement for uses that are *fair*”).

308. *Id.*

309. *See id.* at 1151-52.

310. *Id.* at 1159-60.

311. Weinreb insists that his thesis, despite being vague, is nonetheless applicable. *Id.* at 1153 (“It is a mistake to suppose that because fairness is a very open standard and its application highly fact specific, it is without substantial content.”).

312. *Id.*

tive biography's recognition that each reader, each biographer, must have the chance to be a critic. "Ordinary practice" privileges the judge's perception. Who or what defines ordinary practice?³¹³ Biographical theory? Mass-market pop biography? Authorized biography? By its very definition, normative biography challenges "widely accepted" notions of fairness in the context of biographical writing. Thus, normative biography makes "ordinary" biography an impossibility. And the dubious incorporation of "normative considerations" into ideas of accepted fairness³¹⁴ offers limited comfort to a publisher contemplating a biography.

4. *Proposed Legislation.*

Although recent congressional subcommittee action has been scuttled,³¹⁵ the probability that the future legislative sessions may revive the proposed bills, H.R. 4263 and S. 2370, justifies a discussion of their original and compromise solutions. The original language would have altered the copyright statute to read fair use of a copyrighted work "whether published or unpublished."³¹⁶ While seemingly promising, the legislation would have done no more than eliminate the possibility of a *per se* rule against any use of unpublished material.³¹⁷ The unpublished nature of the work, nevertheless, would have remained a factor in the fair use analysis.³¹⁸

Such mild legislation would have done little to ameliorate the situation created by *New Era* and *Salinger*. As several experts testified at the hearings on the legislation, the case law does not necessarily suggest an absolute bar—the unpublished nature of the work merely has been used by courts as an element in their analysis.³¹⁹ The proposed language did not aid judges or authors in determining the circumstances under which unpublished material can be used;³²⁰ indeed, under the bills, *Salinger* and *New Era* would proba-

313. The ambiguity of "ordinary practice" and the suggestion that the determination may not solve the difficulty appeared in a crucial early fair use case, *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841) (No. 4901). In *Folsom*, Justice Story found no fair use for the appropriation of entire letters. He stated, "the defendant has selected only such materials, as suited his own limited purpose as a biographer. That is, doubtless, true; and he has produced an exceedingly valuable book. But that is no answer to the difficulty." *Id.* at 348.

314. Weinreb, *supra* note 300, at 1153.

315. See N.Y. Times, Oct. 13, 1990, at 1, col. 2.

316. See notes 61-64 *supra* and accompanying text.

317. See *Hearings*, *supra* note 6, at 13 (statement of Floyd Abrams).

318. See *id.* at 3 (opening remarks by Rep. Kastenmeier); 136 CONG. REC. S3549 (statement of Sen. Paul Simon) ("Nor is the bill intended to render the unpublished nature of a work irrelevant to fair use analysis."). Under current four factor analysis, the plaintiff always wins factor two—the nature of the copyrighted material. When the plaintiff wins on factor two, she or he will necessarily win factor four (effect on the market for the copyrighted material), see *Hearings*, *supra* note 6 (statement of Floyd Abrams), the most important factor, according to the Supreme Court. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566 (1985). Thus, eliminating a *per se* rule will not necessarily change the outcome of the four factor analysis.

319. See note 318 *supra*.

320. *Hearings*, *supra* note 6, at 4 (statement of Jonathan W. Lubell, terming the amendment "vague"); *id.* at 64-66 (statement of Ralph Oman); *id.* at 2 (statement of Judge Miner); *id.* at 1 (statement of Barbara Ringer, terming the bills "broad").

bly be decided the same way.³²¹ The software industry lobbied against the language for a different reason. It believed that the bills would have had a detrimental application to often unpublished computer software. Compromise language limited fair use of unpublished materials to "history, biography, fiction, news, and general interest reporting, or social, political, or moral commentary."³²² The new words did not change the approach of the original language; courts remained free to grant broad fair use to published materials and curtail fair use of unpublished materials.

Regardless of the wording a future Congress may settle on, the intent of the bills may remain the same: to clarify that fair use analysis should apply to unpublished materials, probably only when used in literary works. But, contrary to the congressional testimony of optimistic proponents³²³ and pessimistic opponents,³²⁴ the original language did not ensure that most unpublished materials will survive the fair use analysis—and the new language compounded the problem. If the original bills ironically might have codified the distinction between published and unpublished material that already exists within the four factor analysis,³²⁵ the compromise version definitely did. The language created a fair use spectrum: broad fair use for published materials; no fair use for unpublished materials used in nonenumerated works; and limited fair use for unpublished materials used in the enumerated literary works. As long as future draft bills continue to support an interpretation that unpublished materials receive narrow fair use considerations, the bills change nothing for normative biography.

Each of these suggestions looks to alter the fair use doctrine to resolve the "contest" between biographers and subjects. Granted, in some ways each suggestion would help biographers. But when fair use is the legally accepted doctrine by which a court considers everything from the morality to the commercial value of appropriation, the biographer bears the burden of justifying every use. Moreover, fair use removes from the analysis the crucial role of the reader and the understanding of biography's interpretive nature. Fair use simply may be the wrong aspect of copyright to alter.

C. *Fact Use*

A third solution, and the one I prefer, builds on a recognition of the implicit legal assumptions underlying, and reconsiders the legal understanding of, the fact/expression dichotomy. It reimagines the fact/expression dichotomy, not as an attempt to determine, in a final, legal sense, objective reality, but as the recognition of interpretive biography—a method of using

321. In both cases, the court could reason that although the fair use analysis applies to published and unpublished work, the unpublished nature of materials limits the extent of permissible use.

322. N.Y. Times, Oct. 13, 1990, at 1, col. 2.

323. See *Hearings, supra* note 6, at 13 (statement of Floyd Abrams); *id.* at 3 (statement of Chief Judge Oakes); *id.* at 3-5 (statement of Judge Leval).

324. See *id.* at 1-3 (statement of Jonathan Lubell); *id.* at 1, 6 (statement of Barbara Ringer); *id.* at 1-3 (statement of Judge Miner).

325. See note 318 *supra*.

written material I shall call "fact use." Under fact use, using unpublished material as "fact" does not infringe the copyright. In short, fact use suggests that biographers' quotations of unpublished expression should be classified as "fact" under the fact/expression part of a copyright analysis and thus permitted.

Although fact use has not explicitly been recognized, courts have sensed that biographers' use of quotations as fact deserves recognition and have struggled to find a rationale for protection. In *Harper & Row*,³²⁶ for example, the Supreme Court found an exception for President Ford's characterization of the White House tapes as a "smoking gun."³²⁷

In *Meeropol v. Nizer*,³²⁸ which considered the Rosenberg biography, the court wrote that quotation "may be essential to an accurate rendition of the relevant thoughts themselves. Furthermore, the subjects' expression itself may be a relevant part of the history relating to the case."³²⁹ In the district court decision in *New Era*, Judge Leval described an unpublished quotation by L. Ron Hubbard: "[his] utterances are . . . pertinent historical facts."³³⁰ Leval emphasized that "[t]he important facts . . . are the words themselves."³³¹ In his *New Era* concurrence, Judge Oakes distinguished between "words that are facts calling for comment" and "that words themselves may be facts to be proven."³³² Judge Leval in his *Harvard Law Review* article asked, "[I]s it not clear . . . that at times the subject's very words are the facts?"³³³ Although the importance of fact use has been noticed by some judges and commentators, it has not been recognized by any appellate court as a valid legal doctrine.³³⁴

Fact use analysis would not necessarily be easier to perform than a fair use analysis. Critics will no doubt question how a judge can determine whether material is used as a "fact." I doubt any simple test can be found. But at least fact use would be more closely tied to broader, deeper understandings of biography—biography the way *biographers* write it and the way *readers* read it—and would permit a normative vision of biography with its attendant revisionary possibility. Unlike the passive fair use test, fact use would require the addition of creative material by the biographer because a quotation only becomes a "fact" when a biographer incorporates it into the

326. *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985).

327. *Id.* at 563.

328. 417 F. Supp. 1201, 1212 (S.D.N.Y. 1976), *aff'd in part, rev'd in part*, 560 F.2d 1061 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978).

329. *Meeropol*, 417 F. Supp. at 1212. Although the Second Circuit reversed the district court's grant of summary judgment, it suggested that the manner of using the letters "quoted out of chronological order . . . without indication of elisions or other editorial modifications" had played a large role in its decision. *Meeropol*, 560 F.2d at 1071.

330. *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1527 (S.D.N.Y. 1988).

331. *Id.* at 1524.

332. *New Era*, 873 F.2d 576, 592 (2d Cir. 1989).

333. Leval, *supra* note 19, at 1115.

334. *Cf. Wright v. Warner Books, Inc.*, 748 F. Supp. 105 (S.D.N.Y. 1990) (Circuit Judge Walker, sitting by designation) (holding that biographer's quotation from the unpublished papers of Richard Wright constituted fair use).

biography; however, such incorporation has a far broader meaning than, for example, Judge Leval's transformative use.

I do not attempt here an exhaustive discussion of the precise contours of fact use; but, I will sketch some of its aspects. Fact use precedes fair use—it forces courts to decide what they now presume: fact or expression. But although fact use employs the words of dichotomy, it adopts an ever-changing categorization. Under fact use, quotations from unpublished materials become facts when the materials “establish information, verisimilitude and truthfulness.”³³⁵ “Becoming fact” involves presentation by the biographer of quotations and conclusions and the possibility of critical reception by the reader. A biographer may use a quote in many ways: to support a point in the biographer's thesis, to offer a version of the author's voice, to demonstrate the author's style, to convey verisimilitude—the sense of “being there”—or to serve some yet unimagined purpose. After a *prima facie* showing that the biographer had used the quote as “fact,” the burden would shift to the plaintiff to show that the biographer did *not* use the material as a fact. Fact use would apply to all materials regardless of their published or unpublished status.³³⁶ Certain uses probably would not constitute fact use: overextensive quotation to demonstrate a point, taking material out of context, using material without purpose or without attribution, or using the material to bare details about the subject with malicious intent. These uses fail to suggest information and verisimilitude. They do not accord quotations the respect, dignity, and integrity that our loose idea of “fact” requires. I do not mean by this qualification that a biographer could not disagree, dispute, or deny the original author's statement. A biographer could write that the original author was wrong and misguided—and could use expression as fact to demonstrate her or his point. But when the biographer quotes an author's words without context or understanding, intending only to denigrate the original author's humanity, the biographer no longer uses the words as fact. The biographer has betrayed her or his obligation to subject, reader, and self.³³⁷ My conception of “fact use” is not simply a

335. I.B. NADEL, *supra* note 119, at 10-11; see text accompanying note 263 *supra*.

336. Determinations of the legality of using what is undisputedly “expression”—for example, large amounts of material for anthologies—would remain subject to current fair use analysis.

337. Biography reviews repeatedly praise the obligation of the biographer to balance stern, careful criticism with human understanding. See, e.g., David Bevington, *A Classic and a Brawler*, N.Y. Times, Mar. 19, 1989, § 7 (Book Review), at 20, col. 3 (praising DAVID RIGGS, BEN JONSON: A LIFE (1989): it “not only fully justifies our curiosity, but handles with admirable tact what might be lurid and sensational if our only interest were the gossip”); Deirdre Bair, *Going Hoarse for Literature*, N.Y. Times, Mar. 5, 1989, § 7 (Book Review), at 15, col. 1 (praising the presentation of Flaubert in HERBERT LOTTMAN, FLAUBERT: A BIOGRAPHY (1989), as “inviting sympathy even while [Flaubert] provokes animosity”); Diggins, *supra* note 18, at 27, col. 2 (praising MARTIN BAUML DUBERMAN, PAUL ROBESON: A BIOGRAPHY (1988), for “a superb biography of a great man who started out with the right moral convictions only to reach the wrong political conclusions”).

Others have been chided for their failures. See, e.g., Caroline Seeborn, *Taking On The Town*, N.Y. Times, Oct. 21, 1990, § 7 (Book Review), at 11, col. 3 (suggesting that Brendan Gill's gratuitous slights and “obsession with his subjects' social and financial position, the clubs they belong to, and their sexual proclivities (a particular emphasis is placed on homosexuals), reveals all too clearly

judicial recognition that expression is sometimes fact, as Judges Leval, Newman, or Walker would have it.³³⁸ It is broader than that. It grants rights of quotation to biographers who are out to understand, not simply exploit, the subject; who seek to use subjects to question the present world as well as describe the past one; who desire to work with the subject to bring her or him into the contemporary world, mingling eras and questioning reigning myths.

Fear of biography and the desire to keep things unpublished and private often rests on a fear of how others—society—will treat us when they discover our secrets. Will they mock us, hate us, laugh at us—or will they perceive our humanity? To judge without explanation and exploration is to condemn the biographer and reader without trial. The current doctrine lures biographers into playing judge without procedural safeguards—they need not, indeed cannot, offer support for contentions based on unpublished materials. Moreover, the law allows the reader and biographer to be swept up by the underlying assumptions. Fact use, however, creates a gap through which biographers and readers can discard their assumptions. Fact use encourages quotation by biographers of unpublished material to support contentions and understandings. The act of aligning quotations and conclusion will remind biographers of normative biography's claim that biography is, first and foremost, interpretive. The reader confronted with the quotations and conclusion cannot escape making her or his own criticisms, and reinterpreting the author's interpretation. Fact use builds into biography the beginnings of revisionary possibilities.

So for those readers who ask, "looks intriguing, but will it run?" I very briefly outline a possible scenario had the *New Era* trial court invoked fact use. Russell Miller and his publisher, Henry Holt, Inc., would have claimed that all the quotations were used as facts to communicate "information, verisimilitude and truthfulness." The holder of Hubbard's copyright, New Era, would have rejected the claim and argued, first, that the quotations were not used as fact; and second, that those which constituted expression, infringed the copyright. The fact use analysis would resemble Judge Leval's fair use opinion in substance but not in structure.³³⁹ The court would consider

that the author's outsider status, even at this point in his life, remains an unhealed wound"); James Atlas, *Band of the Stewbums*, N.Y. Times, Nov. 26, 1989, § 7 (Book Review), at 18, col. 4, at 19, col. 2 (stating of BETTINA DREW, NELSON ALGREN: A LIFE ON THE WILD SIDE (1989), that "[t]ime and again, she exonerates Algren instead of making an effort to understand his behavior"); Kathleen Quinn, *Brave New Career*, N.Y. Times, Oct. 22, 1989, § 7 (Book Review), at 25, col. 2 (criticizing DAVID KING DUNAWAY, HUXLEY IN HOLLYWOOD (1989), for his "adolescent" interest with respect to "gracelessly conjectur[ing]" about whether Huxley's first wife was a lesbian). But see Barbara Grizzuti Harrison, *Perversity Raised to a Principle*, N.Y. Times, May 7, 1989, § 7 (Book Review), at 11, col. 1 (chastising FIONA MACCARTHY, ERIC GILL: A LOVER'S QUEST FOR ART AND GOD (1989), for her lack of "moral outrage" over Gill's incestuous relationships).

338. See notes 326-334 *supra* and accompanying text.

339. Several parts of Judge Leval's substantive discussion become irrelevant under fact use. Effect on the market disappears. As Judge Leval noted in his opinion, "[t]he statute does not concern itself with market effect resulting from competition to apprise the public of an area of factual interest." *New Era Publications, Int'l v. Henry Holt & Co.*, 695 F. Supp. 1493, 1522 (S.D.N.Y. 1988). "Substantiality"—how important a part of the first work is used, Harper & Row Publishers,

whether Miller's passages were used to convey information, verisimilitude, and truthfulness. If the quotations appeared to be used as "fact," the quotations would be presumptively permissible. Most of the quotations appear to have been used as fact. Hubbard's copyright holder thus would bear the burden of proving that Holt and Miller had not used the quotes as facts because, for example, they were taken out of context or were used maliciously or without purpose. Few quotes appear to have been so used. Thus the court would find that Holt and Miller could use the majority of quotations. Only the few quotes constituting "expression" would face a fair use analysis.

But more important than the doctrinal application of fact use to *New Era* is the hypothetical consequences of the decision. Fact use shifts the burden from the biographer or publisher to prove "fair" use to the plaintiff to demonstrate that the biographer failed to use the quotations as facts. In a sense, the plaintiff must prove *lack* of revisionary possibility in the biography. Fact use encourages biography by ensuring a legal analysis that avoids the chilling effect of *New Era*, listens to a *biographer's* reasons for using quotes, and privileges those biographies that approach normative biography's provocative power. Fact use, therefore, emphasizes that biography is an organic process—it is neither only the life of the subject nor the ideas of the biographer. It assumes that biographer and subject have rights and responsibilities. The subject should not have her or his words lifted in large chunks by a freeriding biographer and employed only as expression; however, the subject also should allow these words to be used as facts by others in order to tell the history in which she or he participated. The family can lock up, burn, and hide unpublished materials; however, it assists human history when it permits access to documents, allows others to share its understandings of the subject, and alters its representation of the subject's concerns in light of changing time. The reading public could read any biography written and published; however, it aids human understanding when it ensures that financial support exists for those biographies which attempt to change assumptions about society, and maybe, once in a while, sits down and read them. Judges can ignore literary theory, avoid change, prefer simplicity and efficiency, draw lines, use proxies—do everything possible to stamp out any form which might cast doubt upon the correctness of current doctrine; however, they fulfill the trust with which our system imbues them when they shape the law to promote biography, make complex contextual decisions to the best of their ability, and search for the revisionary possibility in the law.

Martha Minow writes, "Legal decisions engrave upon our culture the stories we tell to and about ourselves, the meanings that constitute the traditions we invent."³⁴⁰ In the law of biography, legal decisions do not engrave;

Inc. v. Nation Enterprises, 471 U.S. 539, 564-66 (1985)—would vanish. Things are no less "fact" because they constitute the "heart" of the expression.

340. Martha Minow, *The Supreme Court 1986 Term—Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 95 (1987).

rather, they tend to slice stories out of our culture. They silence our voices. They prohibit our invention. As a society, we have a responsibility to tell, invent, and explore, and then retell, reinvent, and reexplore. Biography describes this ability; current law circumscribes it. But in the end, when the lawyers close their briefcases and the writers retire their pens, law and biography are our creations. And from our right to know ourselves, we must not shrink back.